



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

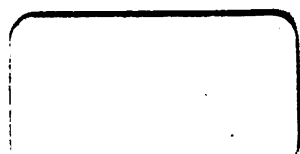
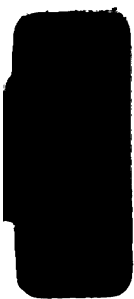
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

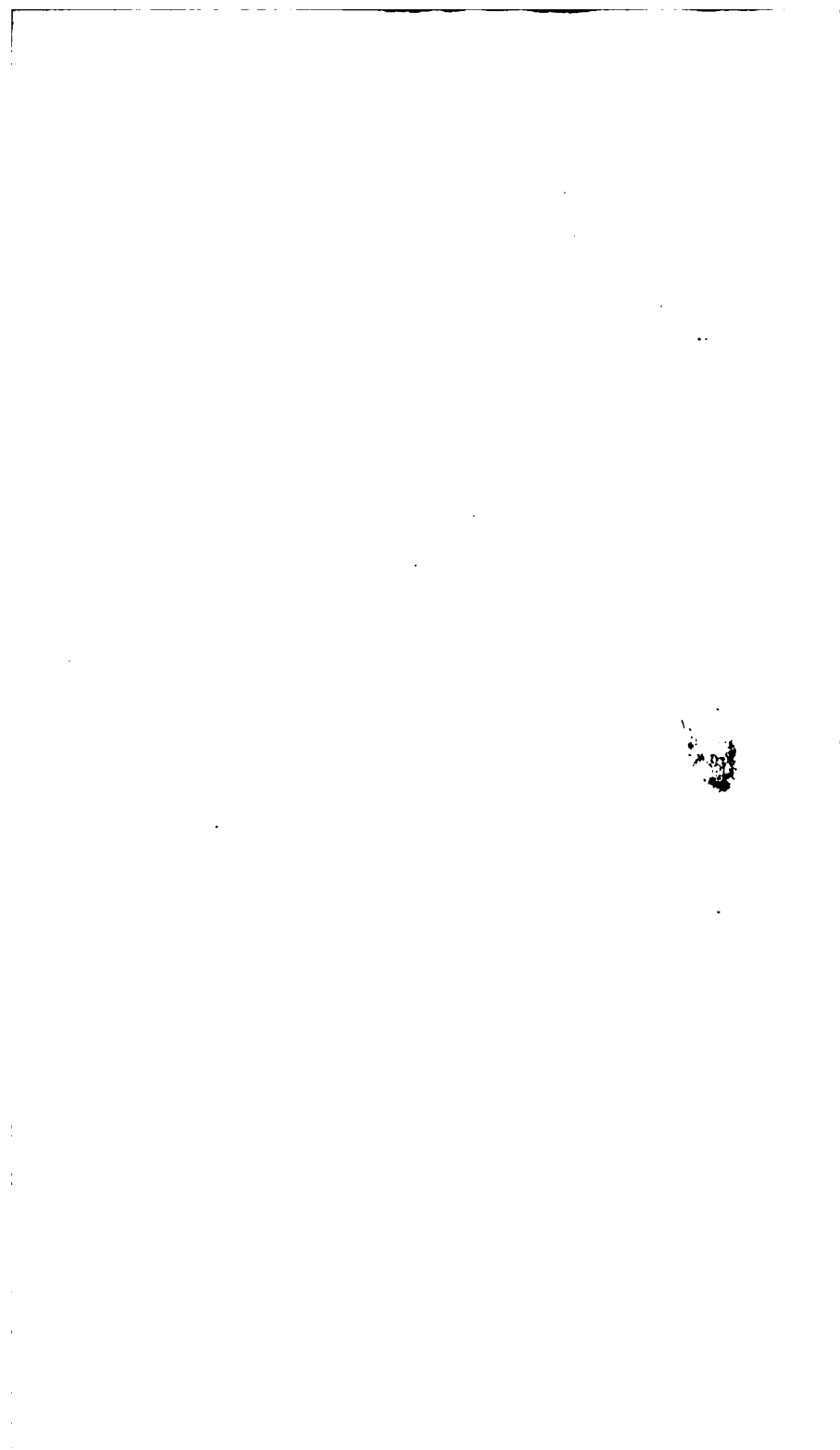
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

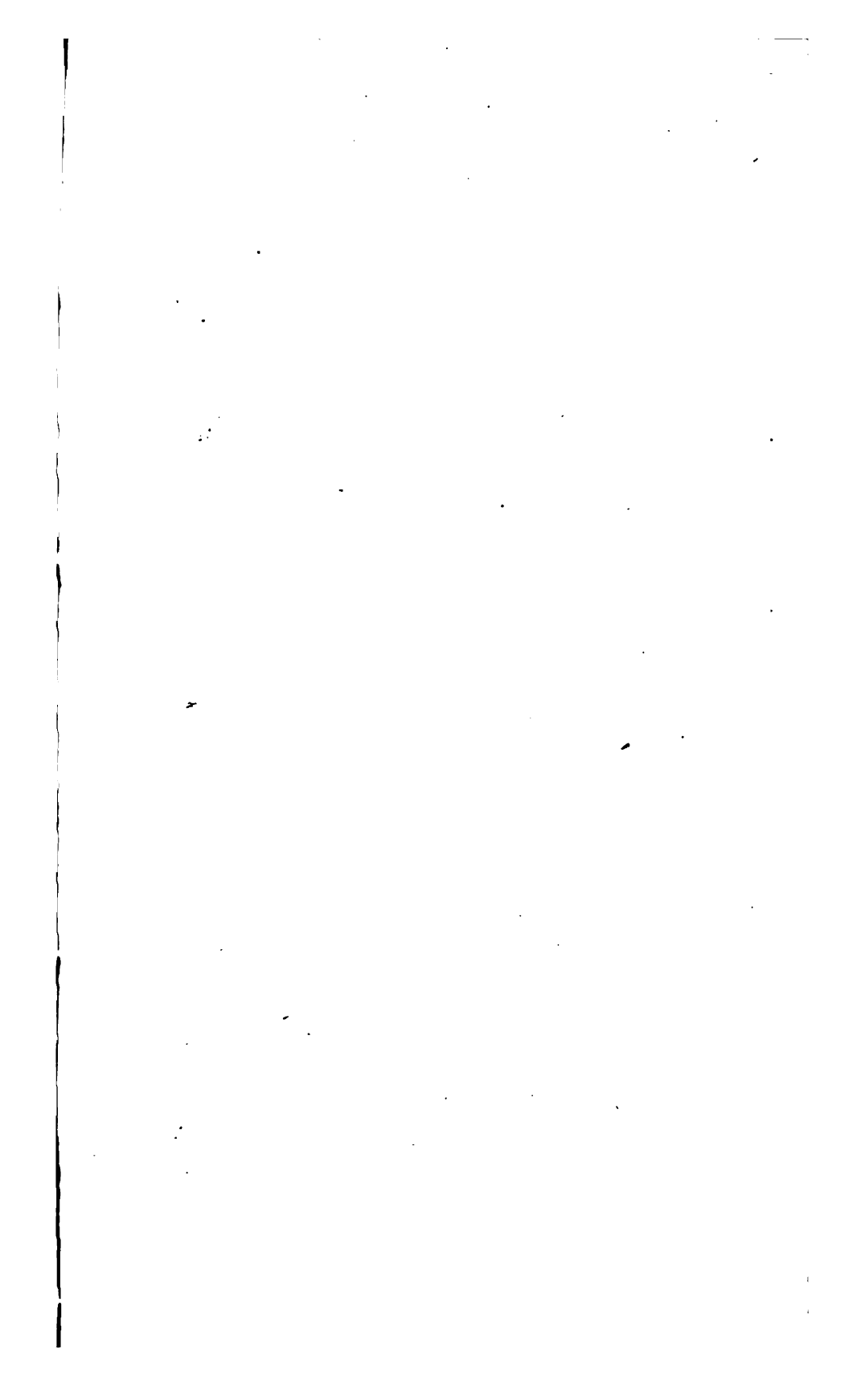
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>











THE
AMERICAN REPORTS:

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. XVI.

CONTAINING ALL CASES OF ANY GENERAL IMPORTANCE IN THE FOLLOWING
REPORTS:

60 CONNECTICUT; 64 ILLINOIS; 65 ILLINOIS; 66 ILLINOIS; 67 ILLINOIS;
62 MAINE; 9 NEVADA; 53 NEW HAMPSHIRE; 70 NORTH CAROLINA;
2 SOUTH CAROLINA; 3 SOUTH CAROLINA; 4 SOUTH CAROLINA.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1876.

121656

JUL 29 1942

Entered, according to act of Congress, in the year eighteen hundred and seventy-six,

By JOHN D. PARSONS, Jr.,

In the office of the Librarian of Congress, at Washington.

JOHN D. PARSONS AND COMPANY,
PRINTERS AND STENOGRAPHERS,
ALBANY, N. Y.

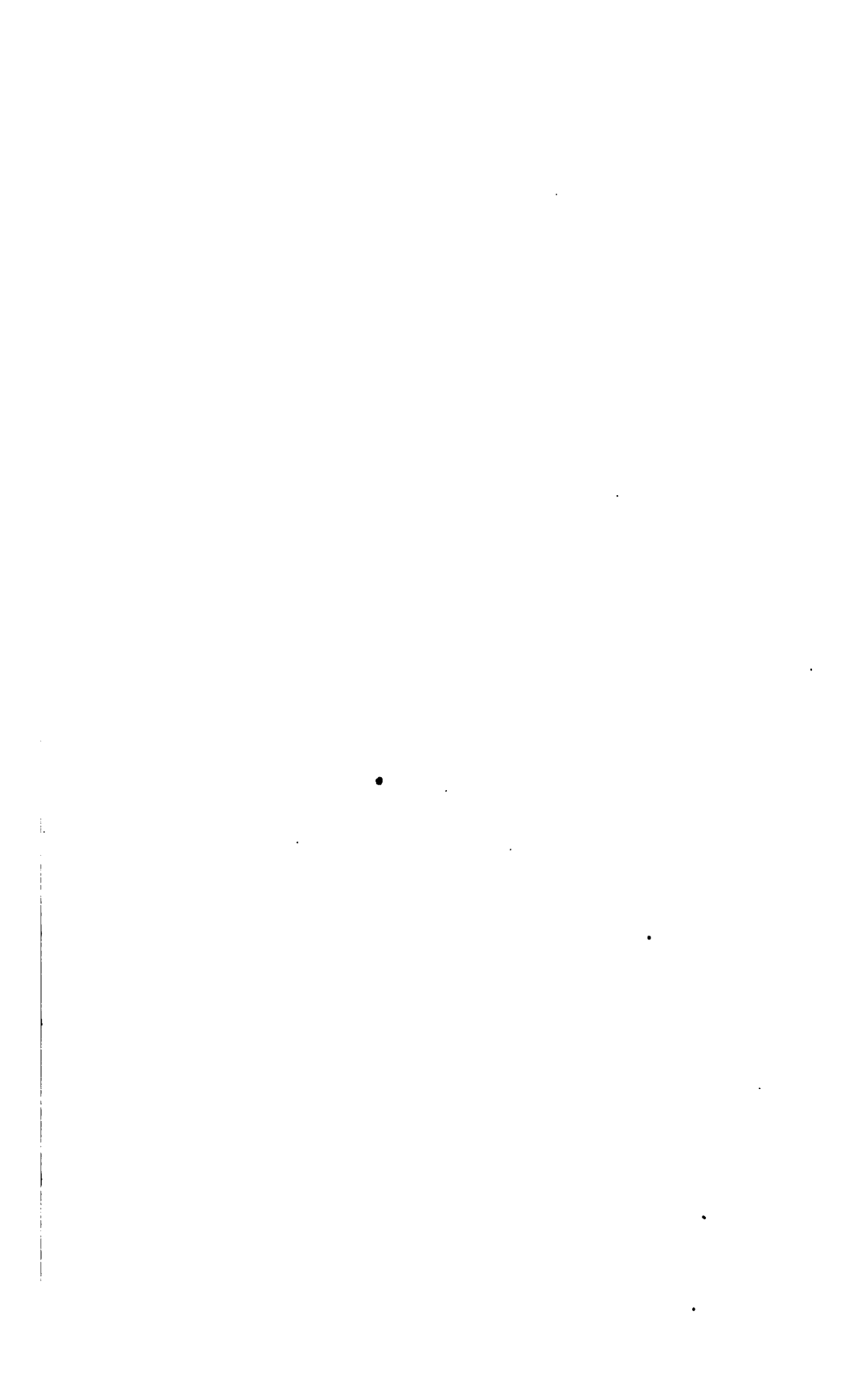
W. 121656

SCHEDULE

OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parentheses, and the volumes of American Reports in heavy letter.

Alabama (44) 4; (45) 6; (46) 7; (47) 11.
Arkansas (25) 4; (26) 7; (27) 11.
Bush (Ky.) (7) 8; (8) 8; (9) 15.
California (39) 2; (40) 6; (41, 42) 10; (43, 44, 45, 46) 12.
Colorado (1) 9.
Connecticut (36) 4; (37, 38) 9; (39) 12; (40) 16.
Florida (13) 7; (14) 14.
Georgia (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12; (47, 48, 49, 50) 15.
Grattan (Va.) (20) 3; (21) 8; (22) 12; (23) 14.
Heiskell (Tenn.) (1) 2; (2) 5; (3) 8; (4, 5) 18.
Houston (Del.) (3) 11; (4) 15.
Illinois (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11; (59, 60, 61, 62, 63) 14; (64, 65, 66, 67) 16.
Indiana (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10; (39, 40, 41, 42, 43) 18; (44, 45, 46) 15.
Iowa (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11; (35, 36) 14.
Kansas (5, 6) 7; (7, 8, 9) 12; (10, 11, 12) 15.
Louisiana (22) 2; (23) 8; (24, 25) 13.
Maine (57) 2; (58) 4; (59) 8; (60) 11; (61) 14; (62) 16.
Maryland (31) 1; (32, 33) 3; (34, 35) 6; (36, 37) 11.
Massachusetts (100) 1; (101, 102) 8; (103) 4; (104) 6; (105) 7; (106) 8; (107) 9; (108) 11; (109) 12; (110) 14; (111, 115) 15.
Michigan (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12; (27, 28) 15.
Minnesota (15) 2; (16, 17, 18) 10.
Mississippi (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12.
Missouri (46) 2; (47) 4; (48, 49) 8; (50, 51) 11; (52, 53, 54) 14.
Nevada (6) 3; (7) 8; (8) 16.
New Hampshire (48) 2; (49) 6; (50) 9; (51) 12; (52) 13; (53) 16.
New Jersey (34) 3; (35) 10; (36) 13.
New York (41, 42) 1; (43) 3; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50, 51) 10; (52) 11; (53, 54) 13; (55) 14; (56, 57) 15.
North Carolina (65) 6; (66) 8; (67, 68, 69) 12; (70) 16.
Ohio (19) 2; (20) 5; (21) 8; (22) 10; (23) 13; (24) 15.
Oregon (3) 8.
Pennsylvania (62) 1; (63, 64, 65) 3; (66, 67) 5; (68, 69) 8; (70, 71) 10; (72, 73) 13; (74, 75) 15.
Rhode Island (8) 5; (9) 11; (10) 14.
South Carolina (1 N. S.) 7; (2, 3, 4) 16.
Texas (32) 5; (33, 34) 7; (35, 36, 37) 14.
Vermont (42) 1; (43) 5; (44) 8; (45) 12; (46) 14.
West Virginia (4) 6; (5) 13.
Wisconsin (24) 1; (25) 8; (26) 7; (27, 28, 29) 9; (30, 31) 11 (32, 33) 14.



LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

CONNECTICUT.

ORIGEN STORRS SEYMOUR, ~~CHIEF JUSTICE~~,
JOHN DUANE PARK,
ELISHA CARPENTER,
LAFAYETTE SABINE FOSTER,
JAMES PHELPS.

ILLINOIS.

CHARLES B. LAWRENCE, ~~CHIEF JUSTICE~~,
PINKNEY H. WALKER,
JOHN M. SCOTT,
ANTHONY THORNTON,
SIDNEY BREESE,
WILLIAM K. McALLISTER,
BENJAMIN R. SHELDON.

MAINE.

JOHN APPLETON, ~~CHIEF JUSTICE~~,
JONAS CUTTING,
CHARLES W. WALTON,
JONATHAN G. DICKERSON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WILLIAM WIRT VIRGIN,
JOHN A. PETERS.

NEVADA.

A. C. WHITMAN, ~~CHIEF JUSTICE~~,
THOMAS P. HAWLEY,
C. H. BELKNAP.

LIST OF JUDGES.

NEW HAMPSHIRE.

JONATHAN EVERETT SARGENT, Chief Justice.
WILLIAM LAWRENCE FOSTER,
ELLERY ALBEE HIBBARD,
CHARLES DOE,
WILLIAM SPENCER LADD,
JEREMIAH SMITH.

NORTH CAROLINA.

RICHMOND M. PEARSON, Chief Justice.
EDWIN G. READE,
WILLIAM B. RODMAN,
THOMAS SETTLE,
WILLIAM P. BYNUM.

SOUTH CAROLINA.

G. J. MOSES, Chief Justice.
A. J. WILLARD,
J. J. WRIGHT.

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Abbott v. Ross.....	437	Coombs, Stringer v.....	414
Adams, Robinson v.....	423	County of St. Clair, Livingston v.....	516
Aldrich v. Wright.....	389	Cromwell, Norfleet v.....	787
Andes Ins. Co., Illinois Ins. Co. v.....	680	Currier v. Lockwood.....	40
Androscooggin R. R. Co., Lawler v.....	498	Davis, Welsh v.....	680
Austin v. Bristol.....	23	Drakeley, Monson v.....	74
Baker, City of Dixon v.....	591	Eastman v. Clark.....	192
Baldwin v. Greenwoods Turnpike Co..	33	Emery v. Hobson.....	513
Barnes, Manufacturers' Nat. Bank v....	576	European & North American R. R. Co.,	
Bartlett v. Western Union Tel. Co....	437	Hanson v.....	404
Bigelow, Jerome v.....	597	Everett, Hale v.....	33
Bissell v. City of Kankakee.....	554	Ex parte Roberts.....	1
Boyer, Paxton v.....	615	Fairbury & Northwestern R. R. Co.,	
Boykin v. Boykin.....	776	Marsh v.....	584
Bradbury v. Cony.....	449	Fairbury, Pontiac and Northwestern R.	
Brereton, City of Pekin v.....	630	R. Co., Langabier v.....	589
Brewer Brick Co. v. Inhabitants of		Fay v. Parker.....	570
Brewer.....	395	Frost v. Plumb.....	19
Bristol, Austin v.....	33	Greenwoods Turnpike Co., Baldwin v..	33
Bronson, St. John's Parish v.....	17	Grush, Toledo, Wabash & Western R.	
Brown v. Collins.....	373	R. Co. v.....	615
Brown, Ward v.....	561	Hale v. Everett.....	33
Burgess v. Carpenter.....	643	Hale v. Sherwood.....	37
Campbell v. Portland Sugar Co.....	508	Hanson v. European & North American	
Carpenter, Burgess v.....	643	R. R. Co.....	404
Carroll v. City of East St. Louis.....	632	Hartley, Indianapolis, Bloomington &	
Chapman, Mather v.....	46	Western R. R. Co. v.....	634
Charleston, Johnson v.....	721	Haskins v. Royster.....	739
Charleston, Trenholm v.....	732	Hobson, Emery v.....	513
Chase v. Silverstone.....	419	Hunter v. Randall.....	490
Chicago & Alton R. R. Co. v. People ex		Illinois Mut. Ins. Co. v. Andes Ins. Co..	630
rel. Koerner.....	599	Indianapolis, Bloomington and West-	
City of Dixon v. Baker.....	591	ern R. R. Co. v. Hartley..	634
City of East St. Louis, Carroll v.....	632	Inhabitants of Brewer, Brewer Brick	
City of Jacksonville, Toledo, Wabash		Co. v.....	395
& Western R. R. Co. v.....	611	Jerome v. Bigelow.....	597
City of Kankakee, Bissell v.....	554	Johnston v. Charleston.....	721
City of Newbern, Smith v.....	706	Kelly, Thomas v.....	718
City of New Haven, Mead v.....	14	Lake v. Milliken.....	456
City of Pekin v. Brereton.....	630	Lake, Peters v.....	588
Clark, Eastman v.....	192	Langabier v. Fairbury, Pontiac &	
Clewley, Small v.....	410	Northwestern R. R. Co.....	589
Collins, Brown v.....	373		
Collins, State v.....	771		
Commercial Ins. Co. v. Robinson.....	557		
Connor v. Sullivan.....	10		
Cony, Bradbury v.....	449		
Coogan v. Parker.....	659		

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Lawler v. Androscooggin R. R. Co	498	Roberts, Ex parte.....	1
Littlefield, Little v.....	388	Robinson v. Adams.....	478
Lookwood, Currier v.....	40	Robinson, Commercial Ins. Co. v.....	557
Lovington v. County of St. Clair.....	518	Robson, Martin v.....	978
Manufacturers' Nat. Bank v. Barnes..	578	Rockford, Rock Island & St. Louis R. R. Co. v. Sage.....	597
Marsh v. Fairbury & Northwestern R. R. Co.....	564	Rogers, Minor v.....	69
Martin v. Robson.....	578	Rose, Abbott v.....	457
Mascott v. Moses.....	697	Royster, Haskins v.....	789
Mather v. Chapman.....	46	Sage, Rockford, Rock Island & St. Louis R. R. Co. v.....	597
McCrea v. Port Royal R. R. Co.....	739	Sherwood, Hale v.....	37
McPherson, State v.....	769	Silverstone, Chase v.....	419
Mead v. City of New Haven.....	14	Small v. Clewley.....	410
Milliken, Lake v.....	456	Smith v. City of Newbern.....	708
Minor v. Rogers.....	69	South Carolina R. R. Co., Redding v.....	661
Monson v. Drakeley.....	74	Southern Express Co., Porter v.....	798
Moses, Massot v.....	697	Spaulding v. Woodward.....	398
Newman, State v.....	8	State v. Collins.....	771
Nordet v. Cromwell.....	787	State ex rel. Attorney-General v. Platt.....	647
Ohio & Mississippi R. R. Co., Wilson v.....	565	State v. McPherson.....	769
Palmer v. Railroad.....	789	State v. Newman.....	8
Parker, Coogan v.....	669	State v. Rankin.....	787
Parker, Fay v.....	270	St. John's Parish v. Bronson.....	17
Paxton v. Boyer.....	615	Stringer v. Coombs.....	414
People ex rel. Koerner, Chicago and Alton R. R. Co. v.....	599	Sullivan, Connor v.....	19
People, Walsh v.....	569	Thomas v. Kelly.....	716
People v. Wilson.....	588	Toledo, Wabash & Western R. R. Co. v. City of Jacksonville.....	511
Peters v. Lake.....	598	Toledo, Wabash & Western R. R. Co. v. Grush.....	618
Platt, State ex rel. Attorney-General v.....	647	Trenholm v. Charleston.....	788
Plumb, Frost v.....	18	Walsh v. People.....	569
Porter v. Southern Express Co.....	762	Ward v. Brown.....	561
Portland Sugar Co., Campbell v.....	508	Washington Ice Co. v. Webster.....	468
Port Royal R. R. Co., McCrea v.....	739	Webster, Washington Ice Co. v.....	468
Railroad, Palmer v.....	789	Welsh v. Davis.....	690
Randall, Hunter v.....	490	Western Union Tel. Co., Bartlett v.....	437
Rankin, State v.....	787	Wilson v. Ohio & Mississippi R. R. Co.....	549
Redding v. South Carolina R. R. Co.....	661	Wilson, People v.....	595
Richardson v. Wyman.....	489	Woodward, Spaulding v.....	398
Riddle v. Littlefield.....	388	Wright, Aldrich v.....	589
		Wyman, Richardson v.....	489

TABLE OF CASES CITED.

	PAGE.		PAGE.
Aaron v. State.....	383	Barrow v. Richard.....	789
Abraham v. Reynolds.....	501	Barry and ano. v. Nesham & Lowthin, 381	
Acton v. Blundell.....	481, 494	Barton v. Hanson, Tibbs and ano. 243, 245, 246, 252	
Agawam Bank v. Sears.....	436	Barton v. Syracuse.....	726
Alken v. B. C. & M. R. R.....	369	Bassett v. Salisbury Manuf. Co.....	396, 426
Alderson v. Waistell.....	383	Baxter v. Ellis.....	431
Allen v. Blunt.....	455	Baxter v. Evitt's Lessee.....	524
Allen v. Jay.....	369	Baxter v. Roberts.....	502
Allshouse v. Ramsey.....	415	Baxter v. Rodman.....	285
Am. Cent. R. R. Co. v. Miles.....	569	Bayley v. Lawrence.....	663, 664, 665, 670
A. M. Co. v. Goodale.....	300	Beach v. Miller.....	581
Amiable Nancy, The.....	761	Beardmore v. Carrington.....	297
Andrews v. Askey.....	305	Beaulieu v. Portland Co.....	436, 494
Arden v. Pullen.....	687, 689	Beckham v. Drake and ano.....	25
Arkerson v. Dennison.....	502	Belfour v. Weston.....	666, 678
Armstrong v. Stokes.....	196, 199	Belknap v. Boston and Maine Railroad, 261, 283, 284	
Ash v. Cummings.....	369	Belknap v. Nat. Bank of N. America.. 436	
Ashford v. Thornton.....	323	Beil v. Jasper.....	80
Ashwix v. Stanwix.....	508	Beil v. Locke.....	599
Athill v. Corbett.....	353	Beil v. Twentyman.....	794
Atkins v. Curwood.....	588	Benest v. Pipon.....	53
Attorney-General v. Chambers.....	518	Benjamin v. Porteus.....	238, 244, 280
Attorney-General v. Drummond.....	112, 124	Benners v. Clemens.....	415
Attorney-General v. Gardner.....	112	Bennett v. Allcott.....	300
Attorney-General v. Hutton.....	112, 124	Bennett v. Chase.....	329
Attorney-General v. Mathias.....	52	Bent v. Baker.....	431
Attorney-General v. Moore's Ex'utors 122		Bentham v. Judkins.....	77
Attorney-General v. Munroe.....	112	Berry v. Hoffner.....	471
Attorney-General v. Murdock.....	112	Berthold v. Goldsmith.....	267, 265
Attorney-General v. Pearson.....	112, 124	Berwick v. Huntress.....	433
Attorney-General v. Shore.....	112, 124	Bessey v. Olliot & Lambert.....	372
Aurora Fire Ins. Co. v. Eddy.....	569	Bickford v. Gibbs.....	515
Austin and ux. v. Wilson and ux.....	307	Bird v. Holbrook.....	347
Avery v. Payne.....	363	Blades v. Higgs.....	356
Bacon v. Boston.....	727	Blake v. Bunberry.....	718
Bacott v. Farnel.....	666	Bloss & Adams v. Bloomer.....	599
Bacott v. Orr.....	50, 51, 52	Bloxham v. Pell.....	220, 221, 222
Bainbridge v. Nelson.....	621	Blundell v. Catterall.....	50, 52
Baker v. Fales.....	127	Boatmen's Ins. Co. v. Parker.....	557
Baker v. Holtzapfel.....	666, 674, 675	Bohannon v. Commonwealth.....	343
Baker v. Lovett.....	17	Bond and ano. v. Pittard.....	259
Baker v. Simmons.....	455	Boniface v. Scott.....	645
Baldy v. Stratton.....	232	Bonsall v. McKay.....	312
Bail v. Herbert.....	52	Boston Dock Co. v. Dewey.....	491
Bail v. Winchester.....	248	Bourne v. Ward.....	412
Baltimore & Susq. R. R. Co. v. Nesbitt et al.....	731	Bowden v. McLeod.....	114
Bank v. Bobo.....	720	Bowers v. Fitzrandolph.....	390
Bank of Augusta v. Earl.....	684, 641	Bradford v. S. C. R. Co.....	247
Banks v. Ogden.....	519	Bradley v. White.....	265
Bannon v. Baltimore & Ohio R. R.....	313	Branner v. Johnson.....	470
Baptist Church v. Rouse.....	124, 157	Breckenridge v. Taylor.....	80
Baptist Church v. Witherell.....	113, 114	Breece v. U. S. Tel. Co.....	443
Barber v. Armistead.....	768	Brickner v. N. Y. C. R. R. Co.....	496
Barbour v. Archer.....	455	Bridgeport v. Railroad Co.....	718
Barclay et al. v. Howell's Lessee.....	524	Brill v. Flagler.....	249, 370
Barker v. Barker.....	366	Bristol v. New Chester.....	326, 334
Barker v. Bates.....	48	Bristol v. Warner.....	45
Barker v. Warren.....	183	Briton v. Great Western Cotton Co.....	503
Barnard v. Poor.....	307	Brittain v. Lloyd.....	514
Barnet v. Reed.....	513	Broadbent v. Ramsbotham.....	423, 424
Barrelli, Tone & Co. v. Brown & Moses, 720		Bromley v. Elliot.....	197, 202, 206, 265
Barrington v. Turner.....	368, 370	Bronson v. Rodes.....	415
Bartlett v. Bricket.....	470	Brooks v. Elkins.....	44
Bartonshill Coal Co. v. Reid.....	499	Brothers v. Carter.....	475, 497

TABLE OF CASES CITED.

	PAGE.		PAGE.
Brown v. Carpenter.....	365, 380	City of Aurora v. Reed.....	581
Brown v. Cook.....	217	City of Cincinnati v. Penny.....	586
Brown v. Frost.....	660	City of Galena v. Cowith.....	555
Brown v. Gordon.....	408	Clancy v. Bryne.....	508
Brown v. Illius.....	426	Clapp v. Hanson.....	481
Brown v. Kendall.....	398, 616, 618	Clark v. Barrington.....	367
Brown v. Perkins.....	860	Clark v. Conroe.....	426
Brown v. Quiller.....	674	Clark v. People.....	543
Bruce v. Morgan.....	524	Clark v. Way.....	708, 709, 707
Bruce v. Taylor.....	524	Clement v. Youngman.....	708, 711, 715
Brunnenmeyer v. Buhre.....	122	Cissold v. Machel and ano.....	306
Bryant v. Eich.....	408, 409	C. & N.W. R. R. Co. v. The People, ex rel.....	259
Buck v. Stewart.....	439	Coates v. Williams.....	390
Bullen v. Appleton.....	198, 204, 206, 206	Cocheco Man. Co. v. Whittier.....	565
	267, 269	Cochran v. Ammon et ux.....	584
Bullock v. Domitt.....	666, 667	Cochrane, in the matter of.....	524
Burokle v. Bokart.....	296	Cockrell v. McQuinn.....	908
Burgess v. Carpenter.....	783	Coggs v. Bernard.....	247
Burnham v. Allen.....	412, 413	Colbeck, in the matter of.....	515
Burnstead v. Alton.....	127	Coleman v. Coleman.....	398, 792
Burrill v. A. B. Church.....	116	Cole v. Swan.....	455
Bush v. Steinman.....	250	Cole v. Van Ripper.....	581
Bussey v. Donaldson.....	314	Collins v. Barrow.....	668
Butler v. Horwitz.....	418	Commercial Bank v. City of Iowa.....	299
Butler's Case.....	8	Commonwealth v. Anthes.....	328
Buzzell v. Laconia, etc., Co.....	502	Commonwealth v. Clarke.....	408
Byron v. State Printing Telegraph Co.....	502	Commonwealth v. Drew.....	360
		Commonwealth v. Ferrill.....	5
Caldwell v. Allen.....	708	Commonwealth v. Holder.....	5
Caldwell v. Fulton.....	708, 709, 709, 707, 708, 710, 711, 712, 714, 715	Commonwealth v. Kimball.....	567
		Commonwealth v. McKie.....	113
Calkins v. Cheney.....	123	Commonwealth v. Porter.....	774
Campbell v. Mesler.....	81	Commonwealth v. Purchase.....	328
Camp's Appeal from Probate.....	72, 74	Commonwealth v. Smith.....	696
Camp v. W. U. Telegraph Co.....	442	Commonwealth v. Upschord.....	8
Canal Nav. v. Pritchard.....	667	Company v. Femold.....	108
Canal Trustees v. Haven.....	625	Concord Bank v. Gregg.....	366
Candee v. Western Union Tel. Co.....	445	Concord R. R. v. Greely.....	108, 128
Cane v. People.....	454	Conner v. Berry.....	586
Carew v. Rutherfordford.....	782	Connolly v. Pollon.....	502
Carey v. Bright.....	313	Conroy v. Belfast and Northern Ocean- ties Ry. Co.....	500
Carey v. Brooks.....	746, 749	Cooke v. Ellis.....	315
Carle v. B. & P. C. R. R. Co.....	498	Cook's Case.....	347
Carlton v. Bath.....	367	Cookson v. Toole.....	544
Carrington v. Taylor.....	363	Coombs v. New Bedford Cordage Co.....	494, 503
Carter et al. v. Bingham.....	468		80
Carter v. Eveleigh.....	694	Cooper v. Tyanm.....	234, 281, 285, 295, 244
Cartwright's Case.....	571	Corcoran v. Holbrook.....	497
Casborne v. Dutton.....	45	Corley v. Kleckley.....	666, 679
Cassart v. The State.....	542	Cornellus v. Walsh.....	599
Cass v. Rudale.....	670	Coster v. Merest.....	458, 454
Cayzer v. Taylor.....	502	Costello v. Cave & Bradley.....	720
C. B. & Q. R. R. Co. v. Dunn.....	585	Coster v. Symonds.....	454
Chaffee v. Jones.....	76, 81	Cowie v. Goodwin.....	606, 673
Chamberlain v. Enfield.....	367	Cox v. Hickman.....	208, 219, 238, 256, 257, 264, 265, 267, 268
Champney v. Blanchard.....	73		
Chandler v. Broughton.....	380	Cram v. Hadley.....	280
Chandler v. Morton.....	421	Cranoh v. Great Northern R'y.....	459
Chapman v. New Haven R. R. Co.....	459	Cratty v. City of Bangor.....	23
Chasemore v. Richards.....	426, 426	Craythorne v. Swinburne.....	80
Chathfield v. Wilson.....	426	C. R. Co. v. Foster.....	322
Cheap v. Cramond.....	251	Credit v. Brown.....	243
Cheatham v. Williamson.....	712, 713	Crowninshield v. Crowninshield.....	412
Cheesley v. Cheesley.....	273	Cummings v. Freeman.....	366
Chicago & N. W. R. R. Co. v. Jackson.....	502	Currier v. Currier.....	416
Chicago v. Robbins.....	727	Cushing v. Wells.....	80
Chicago etc. R. R. Co. v. Murphy.....	495	Cutler v. Emory.....	226
Childers v. Boulnois.....	44		
Child v. Sands.....	295	Daniel v. McRae.....	80
Chiles v. Drake.....	312	Dartmouth College v. Woodward.....	183
Chitham v. Williamson.....	706	Davidson v. Goodall.....	273
Chuck, ex parte.....	258	Davidson v. Goodhall.....	304
Churchill v. Gundy.....	521	Davis v. Detroit & Milwaukee R. R. Co.....	502
Churchill v. Suter.....	431, 432	Davis v. Saunders.....	383
Churchill v. Watson.....	310	Deane v. Clayton.....	247, 248, 256, 263
Church v. Meeker.....	50		
Cilley v. Bartlett.....	452, 455		
City Council v. Baptist Church.....	708		

TABLE OF CASES CITED.

I.

	PAGE.		PAGE.
De Berkow v. Smith.....	234	Finley v. Hunter.....	719
Delano v. Bartlett.....	411, 412	Finney v. Shirley.....	48
Deering v. Sawtelle.....	431	Fisher v. Leslie.....	44
Deenison v. Hyde.....	310	Fisher v. Thirkell.....	508
Denny v. Cabot.....	255	Fitch v. Allen.....	494
Dent v. King.....	455	Fitch v. Harrington.....	305, 306
Dering v. Earl of Winchelsea.....	80	Flanders v. Lamphear.....	306
DeRutte v. Telegraph Co.....	448	Fleming v. Burge.....	46
Detroit Daily Post Co. v. McArthur.....	316	Fletcher v. Peck.....	568
Dibble v. Morris.....	311	Fletcher v. Rylands.....	573, 574, 577, 578, 579, 580, 581
Dickinson v. Larter.....	383	Filke v. Boston and Albany R. R. Co.....	495
Dickinson v. Grand Junction Canal Co.....	422, 424	Floyd v. Abney.....	146
Dickinson v. Valpy.....	264	Ford v. Skinner.....	301
Dillingham v. Smith.....	471, 472	Ford v. Fitchburgh R. R. Co.....	466, 467
Dodson v. Mock.....	380	Foster v. Brooks.....	454
Doe v. Filiter.....	304	Fowler v. Bott.....	666, 679
Doe, ex. dem. Freeland v. Burt.....	679	Fox v. Clifton.....	257, 258
Doe v. Thompson.....	388	Fox v. Hamilton.....	785
Doe v. Wood.....	707, 708, 711, 712	Fox v. Ohio.....	325
Dorman v. City of Jacksonville.....	593	Francis, In re.....	227
Dormay v. Borradaile.....	388	Franklin Fire Ins. Co. v. Hart.....	590
Dorsey v. Gassaway.....	470	Franklin v. March.....	43
Dow v. Sayward.....	367	Frazier v. McPherson.....	694
Drummond v. Attorney-General.....	112, 189	Frazier v. Brown.....	426
Dry v. Boswell.....	242, 280	Frazier v. Pennsylvania R. R. Co.....	502
Duberly v. Gunning.....	300	Freidenhart v. Edmundson.....	314
Dublin Case.....	96, 124, 157, 130, 141, 157	French v. Quincy.....	768
Ducat v. City of Chicago.....	634	Fremont v. Coupland.....	261, 262
Dugan v. Hussey.....	461	Frost v. Union Pacific R. R. Co.....	498
Dunklee v. Wilton R. R.....	380	Fuller v. Bean.....	390
Dunlap v. Snyder.....	380	Funk v. Haldeman.....	706, 708
Eagle Ins. Co. v. Lafayette Ins. Co.....	622	Gable v. Miller.....	113
Easterbrook v. Barker.....	267	Gallagher v. Piper.....	494
East Kingston v. Towle.....	103	Garnaby v. Ray.....	328
Eastman v. Co.....	384	Gannon v. Housatonic R. R. Co.....	502
Eastman v. Keazor.....	367	Gardner v. Merritt.....	72
Eaton v. Swansea Water Works Co.....	13	Garland, Ex parte.....	243
Edgell v. Francis.....	305	Gates v. Green.....	675, 677
Edgerton v. Edgerton.....	45	Gautret v. Egerton.....	507
Edmonson v. Machell.....	395	G. & C. U. R. R. Co. v. Loomis.....	712
Edmunds v. Bushell.....	209	Gellar, Ex parte.....	247
Edwards v. Beach.....	310	Gelpcke v. City of Dubuque.....	556
Edwards v. Etherington.....	668, 669, 673	Gether v. Capper.....	469
Edwards v. Hethrington.....	669	Gibbens v. Ogden.....	182
Edmont v. Pullman.....	794	Gibbons v. Pepper.....	396
E. & I. C. & U. A. S. In Re.....	267	Gibbs v. Linabury.....	435
Edlott v. Southdown R. W. Co.....	785	Gibson v. Armstrong.....	114
Elliot v. Stevens.....	203	Gibson v. Brockway.....	390
Ellis v. American Tel. Co.....	442	Gibson v. Pacific R. R. Co.....	502
Ellis v. Duncan.....	428	Gillis v. Pennsylvania R. R. Co.....	619
Ellsworth v. Potter.....	312	Gilman v. Eastern R. R.....	494
Elmore v. Scurry.....	746	Gilshannon v. Stony Brook R. R.....	494
Elmans v. Turnbull.....	43, 49, 53	Glasgow College v. Attorney-General.....	113
Emblem v. Myres.....	203, 302	Glenn v. Fisher.....	718
Emerson v. Clayton.....	585	Glominger v. Franklin Coal Co.....	708
English and Irish Church and University Assurance Society, In re.....	206	Glover v. Proprietors of Drury Lane.....	566
Epps v. State.....	454	Goddard v. Grand Trunk Ry. Co.....	408, 409
Ernest v. Nicholls.....	256	Goddard v. Railroad.....	760
Estabrook v. Boyle.....	412	Godfrey v. City of Alton.....	523
Evans v. Dendy.....	696	Goodall v. Streeter.....	369
Evans v. Lisle.....	361	Goodbright v. Moses.....	779
Evans v. Walton.....	787	Goodright v. Moss.....	472
Everett v. Youells.....	454	Goodson v. Jenney.....	472
		Gouthwaite v. Luckworth and ano.....	246
Fairbanks v. Kerr.....	458, 459	Grable v. Margrave.....	584, 595, 596
Farr v. Wheeler.....	208	Grace v. Smith.....	220, 221, 222, 223, 231, 232, 233, 234, 235, 251, 254, 260, 261, 262
Farwell v. Warner.....	311	Grangiac v. Arden.....	73
Favor v. Philbrick.....	386	Graves v. Bardon.....	666, 669, 677, 678
Fay v. Rogers.....	80	Graves v. Hodges.....	709
Fearing v. Clark.....	433	Graves v. Shattuck.....	391
Feltham v. England.....	494	Gray v. Combs.....	247
Ferraris v. Vasconcellos.....	123	Gray v. Coombs.....	392
Field v. Field.....	112	Gray v. Jackson.....	367
Fifeid v. Northern R. R. Co.....	502	Greeley v. Maine Central R. R. Co.....	430
Filiter v. Phippard.....	378	Green v. Beasley.....	256
Findlay v. Bear.....	349	Green v. Craig.....	314

	PAGE.		PAGE.
Greenland v. Chaplin.....	456	Holmes v. O. C. R. R.....	305, 306
Greenleaf v. Francis.....	421	Holyoke v. Grand Trunk Railway.....	231
Greenleaf v. McColley.....	373	Hopkins v. DeGraffenreid.....	680
Green v. Shepard.....	77	Hopkins v. Railroad.....	275, 277, 284
Greenwood's Case.....	347	Horner v. Marshall.....	383
Gregg v. Wyman.....	19	Houff v. Town of Fulton.....	32
Grey v. Haskinson.....	696	Hounsell v. Smyth.....	507
Grimstead v. Mariowe.....	62	Howard v. Windham County Savings Bank.....	73
Grover v. Grover.....	78	Howarth v. Warner.....	586
Grozler v. Atwood.....	265	Howell v. Jackson.....	351
Grubb v. Bayard.....	706, 712	Howell v. Landore & Siemen's Steel Co.....	600
Guilbert v. Stone.....	373	Howe v. Mutual Safety Ins. Co.....	623
Gundry v. Feltham.....	363	Howe v. Plainfield.....	367
Gunnison v. Langley.....	265	Howe v. Stowell.....	53
Gunter v. Astor.....	783	Hoyt v. Kimball.....	368
		Huckle v. Money.....	273, 280, 319
Haldeinan v. Buckhardt.....	426	Hull and Selby Railway Co.....	512
Hall v. Corcoran.....	19, 22	Hunter v. Middleton.....	625
Hallet v. Cote.....	527	Huntly v. Bacon.....	309
Hallett v. Wylie.....	666, 677	Hunt v. Pownal.....	37
Hall v. Manchester.....	367	Hunt v. State.....	775
Hall v. Richards.....	748	Hunt v. Wright.....	382
Hall v. Vermont & Mass. R. R. Co.....	590	Hurd, admr., v. V. C. R. R. Co.....	494
Halsey v. McCormick.....	526		
Hamilton v. Mendez.....	621	Ibbotson v. Peat.....	363
Hamilton v. Terry.....	469	Illinois Central R. R. Co. v. Welch.....	502
Hamnack v. White.....	380, 385, 386	Ilott v. Wilkes.....	347
Hamper, Ex parte.....	246, 247, 260	Independent Ins. Co. v. Thomas.....	415
Handley's Lessee v. Anthony.....	625	Indermaur v. Dames.....	509
Hannam v. Mackett.....	356	Indianapolis, etc., v. R. Co. v. Hartley.....	631
Hannam v. Mooket.....	363	Inhabitants of Princeton v. Adams.....	113, 124
Hanson v. Vernon.....	399	Inhabitants of Springfield v. Conn. R. R.....	624
Hard v. Vermont & Canada R. R. Co.....	498	Irvine v. Wool.....	504
Harper v. Ind. & St. Louis R. R. Co.....	464, 466, 502	Irwin v. Dearmar.....	306
		Israel v. Israel.....	44
Harrington v. Churchward.....	249	Ivory v. Michael.....	435
Harrison v. Berkley.....	749	Izon v. Gorton.....	666, 673, 679
Harrison v. Central R. R. Co.....	502		
Harrison v. Foreman.....	30, 32	Jacks v. Bell.....	315
Harrison v. Harrison.....	343	Jackson v. Second Avenue R. R. Co.....	406
Harrison v. Lane.....	80	Jaffee v. Hartman.....	509
Harris v. Warner.....	81	James v. Biddington.....	501, 504, 509
Harrow v. Dugan.....	46	James v. Campbell.....	304
Hart v. Aldridge.....	782	James v. Whitbread.....	304
Hart v. Windsor.....	666, 672	James v. Brown.....	355
Harvey v. McLaughlin.....	30	Jennens v. Mount Hope Iron Co.....	484
Haslock v. Ferguson.....	491	Jennings, ex parte.....	54
Hestelov v. Jackson.....	40	Jestons v. Brooks.....	321
Hatch v. Taylor.....	212	Johnson v. Haverhill.....	367
Hawley v. N. S. R. W. C.....	735	Johnson v. Johnson.....	46
Hayden v. Smithville.....	502	Johnson v. Patterson.....	347
Hayes v. Waldron.....	366	Johnson v. People.....	553
Hayward v. Liverpool & London Ins. Co.....	558	Jones v. Jeter.....	783
Haynes v. Thomas.....	628	Jones v. Souard.....	519, 521, 525
Hazard v. Day.....	468	Jones v. Tapling.....	793
Head v. Brisal and wife.....	583	Jones v. Vall.....	455
Healey v. Thorne.....	53	Jordan v. Lashbrooke.....	431
Hearn v. Waterhouse.....	491	Jordin v. Crump.....	347
Helmstreet v. Howland.....	266	Julio v. Ingalls.....	285
Hemmenway v. Stowe.....	76		
Hempstead et al.....	604	Keane v. Boycott.....	787
Hendrickson v. Kingsbury.....	315	Keck v. Halstead.....	364, 370
Hesketh v. Blanchard.....	241, 242	Keeble v. Hickerlingill.....	385
Hewitt v. Swift et al.....	512	Kelly v. Scott.....	203
Hext v. Fraser.....	720	Kelsey v. Holsted & Roseborough.....	720
Heyboe v. Burge.....	200, 263	Kennedy v. Whitwell.....	470
Hickman v. Cox.....	200	Kerr v. Merchants' Exchange.....	678
Hill v. Railroad.....	761	Kilshaw v. Jukes.....	304, 306, 346, 367
Hinckley v. Emerson.....	360	Kimball v. Comstock.....	491
Hoare v. Dawes.....	221, 231, 232	Kimball v. Huntington.....	4
Hobart v. Milwaukee City R. R. Co.....	624	Kimberley v. Dink.....	786
Hodgkinson v. Ennor.....	426	King v. Higgins.....	571
Hoeffner v. Stratton.....	469	King v. Kline.....	368, 369, 370
Hogan v. Central Pacific R. R. Co.....	502	Kinz v. Lord Yarborough.....	519, 521, 529
Hollingsworth v. Duane.....	543	King v. Lourtton.....	77
Holme v. Hammond.....	197, 306, 367	King v. Mawbry.....	326
Holmes v. Clark.....	502	King v. Sutton.....	328
Holmes v. Fisher.....	367	Kinney v. Hoses.....	374
Holmes v. N. E. Railway Co.....	508		

TABLE OF CASES CITED.

xi

	PAGE.		PAGE.
Kittredge v. Elliott.....	367	Matthews v. Beach.....	347
Kittredge v. Woods.....	360	Maxwell v. Palmerton.....	360
Knapp v. Hobbs.....	492	Mayor, etc., of New Orleans v. The	519
Knight v. Foster.....	276	United States.....	361
Knight v. Freeport.....	454	McAlpine v. Mangall.....	442
Kniskern v. Lutheran Churches.....	114, 124	McAndrew v. Electric Tel. Co.....	77
Knowlton v. Tilton.....	8	McCaughy v. Smith.....	23
Krom v. Schoonmaker.....	389	McClary v. Lowell.....	77
Lalor v. Chicago, Burlington & Quincy		McConev v. Stanley.....	117
R. R. Co.....	495	McCorkle v. Montgomery.....	326
Lambert & Olliott v. Bessey.....	372, 374	McCulloch's Lessee v. Aten.....	582
Lamb v. Rickets.....	525	McCutchen v. McGahay.....	458
Langdale, Ex parte.....	247	McDaniels v. McDaniels.....	309
Langley v. Griggs.....	81	McGlynn v. Brodie.....	46
Laning v. N. Y. Central R. R. Co.....	495, 496	McGowan v. West.....	314
Lausell v. Bangor.....	420	McKeon v. Citizens' Railway Co.....	491
Lapham v. Barnes.....	81	McKinney v. Whiting.....	367
Latham v. The Queen.....	328	McLaughlin v. Prior.....	502
Lawyer v. Cipperly.....	113, 114	McMahon v. Davidson.....	689, 690
Leanne v. Bray.....	385, 386, 387	McManus v. Crickett.....	586
Leighton v. Sargent.....	367	McMurtry v. Webster.....	506
Leith v. Pope.....	299	McNamara v. King.....	80
Leonard v. Storer.....	508	McNeil v. Sanford.....	306
Leonard v. Wilkins.....	355	Meagher v. Driscoll.....	646
Lewin's Case.....	353	Measan, ex parte.....	492
Lewis v. Campbell.....	514	Medbury v. Watson.....	52
Limpus v. London Omnibus Co.....	688	Mellor v. Spateman.....	455
Lincoln v. Fitch.....	431	Mench v. Balbach.....	277, 295, 319, 320
Linsley v. Clarke.....	324	Merest v. Harvey.....	373, 375
Linsley v. Bushnell.....	308	Merrell v. Peaslee.....	249
Lisbon v. Lyman.....	382	Meyer v. Sharpe.....	17
Lister v. Perryman.....	367	Middlebury College v. Chandler.....	518
Livett v. Wilson.....	13	Middleton v. Pritchard.....	367
Livingston v. Pippen.....	768	Miles v. Robert.....	113, 123, 124
Lockett v. James.....	461	Miller v. Gable.....	77
Lockwood v. Wood.....	52	Miller v. Gaston.....	73
Loft v. Dennis.....	666	Millspaugh v. Putnam.....	768
Loomis v. Marshall.....	265	Milne v. Davidson.....	393
Loomis v. Terry.....	300, 347, 350	Mitchinson v. Carter.....	368
Lord Chesterfield v. Bolton.....	667	Mitten v. Faudrye.....	267
Lord Montjoy's Case, 702, 703, 706, 707,	712, 713, 714,	Mollwo v. Court of Wards.....	666
		Monk v. Cooper.....	583
Lorne v. Murphy.....	46	Montague v. Benedict.....	583
Loose v. Buchanan.....	379, 384	Montague v. Espinasse.....	695
Low v. Conn. Passumpsic Riv. R. R. Co.....	590	Montgomery v. Eveleigh.....	277
Lowe v. Govett.....	58	Moore v. Bowman.....	183
Lowell v. Boston.....	399	Moore v. Taylor.....	628
Luce v. Carley.....	525	Morgan v. Livingston.....	494, 500
Leeds v. Cheatham.....	660, 667	Morgan v. Vale of Neath Railway.....	836
Lumby v. Gye.....	783	Morley v. Gaisford.....	393
Luqueer v. Prosser.....	45	Morrill v. Morrill.....	45
Luttrell v. Regnell.....	537	Morris v. Lee.....	324, 332
Lyde v. Barnard.....	493	Morrison v. Bedell.....	458
Lyford v. Farrar.....	362	Morrison v. Davis.....	357, 370
Lyman v. Robinson.....	468	Morris v. Nugent.....	616, 618
Lynch v. State.....	774	Morris v. Platt.....	366
Lyon v. Knowles.....	200	Morse v. Bellows.....	883
		Morse v. Crawford.....	369, 360, 370
Macmillan, Ex parte.....	267	Morse v. Nixon.....	463
Magaw v. Lambert.....	696	Morton v. Noble.....	463
Magwood v. Patterson.....	694, 695	Moses et al. v. Pittsburgh, Ft. Wayne &	631
Mahon v. N. Y. C. R. R.....	628	Chicago R. R.....	494, 502
Mallard v. Lawrence.....	127	Moss v. Pacific R. R. Co.....	459
Mair v. Glennie.....	241	Muller v. Mason.....	462
Malloney v. Huran.....	462	Municipality No. 2 v. Orleans Cotton	519, 522
Mallony v. Horan.....	461	Press.....	17
Manly v. Gibson.....	625	Munson v. Washband.....	627, 631
Mann v. Blanchard.....	491	Murphy v. City of Chicago.....	501
Manning v. Wheatland.....	431	Murray v. Currie.....	566
Mann v. Oriental Print Works.....	498	Musgrove v. Musgrove.....	707
Marburg v. Marburg.....	415	Muskett v. Hill.....	543
Marshall Co. v. Cook.....	556		123
Marshall v. Cohen.....	508	Neil v. The State.....	363
Marshall v. Stewart.....	688	Nicolls v. Rugg.....	19
Marsh v. Fulton County.....	556	Nicholas v. Badger.....	310
Martin v. Holgate.....	30, 31	Nichols v. Aylor.....	639
Martin v. Tidwell.....	455	Nichols v. Bronson.....	
Martin v. Waddle.....	527	Nicholson v. N. Y. & N. H. R. R.....	

	PAGE.		PAGE.
Nickerson v. Soesman.....	415	Pleydell v. Earl of Dorchester.....	554
Neima v. State.....	455	Pollard v. Kibbe.....	557
Nesmith v. Clinton Fire Ins. Co.....	452	Pollard v. Schaffer.....	605, 606
Nevins v. City of Peoria.....	528, 529, 551	Pollard's Lessee v. Hagan et al.....	557
New Spanish Factory v. Batchelder.....	360	Pomfret v. Rickfort.....	350
New Orleans v. The United States.....	523, 557	Popplewells v. Hodgkinson.....	455
New River Co. v. Johnson.....	425	Pott v. Eytou.....	252
Newson v. Prior's Lessee.....	554	Powell v. Bagg.....	19
Noakes v. Barlow.....	257	Powers v. Russell.....	411
Norton v. Osborn.....	51	Pratt v. Langdon.....	555
Norton v. Huxley.....	451	Pray v. Northern Liberties.....	358
Norton v. Ladd.....	355, 354	Presbyterian Church v. City of New York.....	732
Noxon v. DeWolf.....	412	Presbyterian Society v. Auburn and Rochester R. R.....	625
Noyes v. Smith.....	495	Prescott v. Holmes.....	606
N. Y. & N. H. R. R. Co. v. Ketchum.....	590	Priestley v. Fowler.....	500
		Preston's Heirs v. Bowman.....	524
Odlin v. Gove.....	355	Priestly v. Fowler.....	494
O. & M. R. R. Co. v. Wheeler.....	674	Proprietors etc. v. N. S. & E. R. Co.....	630
O'Neill v. Abney.....	655	Protheroe v. Matthews.....	357, 370
Ormond v. Holland.....	502	Putnam v. Payne.....	349
Orton's Trust, in re.....	31	Putnam v. Sullivan.....	423
Oswald's Case.....	543, 544		
Owen v. Body.....	259	Quinby v. Morrill.....	412
Page v. Parker.....	277	Rafferty v. The People.....	541
Palmer v. Portsmouth.....	357	Railroad v. Dunn.....	750
Paradine v. Jane.....	658, 674	Railroad v. Hinds.....	750
Parent v. Callendar.....	558	Railroad v. Jinnay.....	750
Parish of Bellport v. Tooker.....	115, 115, 117	Railroad v. Quigley.....	751
Parish v. Stone.....	73	Railroad v. Schumier.....	525
Parker v. B. and M. Railroad.....	421	Railroad v. Williams.....	311
Parker v. Colcord.....	328	Ranger v. Great Western Ry. Co.....	755
Parker v. Latner.....	23	Raphael v. Railway Co.....	555
Parker v. Mice.....	350	Rassett v. Cotton.....	553
Parrott v. Hartsheld.....	358, 370	Ray v. Goodwin.....	548
Parrott v. Wells.....	354	Raymond v. Crown and Eagle Mills.....	208
Parsons v. Bedford.....	326	Redpath v. Wigg.....	257
Parsons v. Winchell.....	512	Reeder v. Purdy.....	311
Passenger R. R. Co. v. Young.....	409	Reg. v. Bird.....	325
Patterson v. Gandasequi.....	205	Regina v. Metropolitan Board of Works.....	425
Patterson v. Pittsburgh and Connellsville R. R. Co.....	502	Republica v. Passmore.....	543, 544
Patterson v. Wallace.....	495	Rex v. Cator.....	567
Paul v. Virginia.....	634	Rex v. Neill.....	747
Pearson v. Lemaitre.....	302	Rex v. Papineau.....	746
Peck v. Lockwood.....	50	Rex v. Plympton.....	570
Pendleton v. Davis.....	350, 235	Rex v. Rea.....	717
Pendrill v. Pendrill.....	778	Rex v. Searing.....	354
Penfield v. Thayer.....	73	Rex v. Vaughan.....	570
Penn. and Ohio Canal v. Graham.....	318	Rex v. White.....	745, 747
People v. C. and A. R. R. Co.....	604	Reynolds v. Champlain Trans. Co.....	452
People v. Crowell.....	544	Reynolds v. Toppa.....	255
People v. Freer.....	555, 557, 543, 544	Rhoades v. Parker.....	358
People v. Goodwin.....	330	Rice v. Austin.....	241, 255
People v. Harriss.....	758	Richards v. Farnham.....	307
People v. Keenan.....	775	Richardson v. Kimball.....	492
People v. Kelly.....	455	Richards v. Porter.....	458
People v. Nearing.....	791	Ricker v. Freeman.....	455, 459
People v. Purdy.....	127	Ridgway v. Masting.....	482
People v. Purdy.....	185	Riley v. State.....	455
People v. Seels.....	115, 114, 122	Ripley v. Wightman.....	655, 655, 655, 670, 675
People v. Williams.....	9	Ritchie v. Holbrooke.....	454
Perkins v. Knight.....	451	Rittenhouse v. Ind. Line of Telegraph.....	445
Perkins v. Towle.....	277	Rixford v. Smith.....	332
Perrine v. Hankinson.....	255	Rix v. Johnson.....	525
Perry v. Marsh.....	502	Roberts v. Smith.....	605
Perry v. Phipps.....	355, 350	Robertson v. Bullons.....	114, 114, 121, 123
Pettygrove v. Hoyt.....	471	Robinson v. Barrows.....	470
Petty v. Tooker.....	115, 115, 117, 121, 122	Robinson v. Bates.....	452
Phila. and Reading R. R. Co. v. Derby.....	657, 658	Robinson v. Tuttle.....	137
Phillips v. Dugan.....	418	Roche v. M. G. L. Co.....	354
Phillips v. Stevens.....	655, 656	Rogers v. Horn.....	554
Pickard v. Richardson.....	431	Rogers v. Hunt.....	553
Pierce v. Benjamin.....	470	Rogers v. Madden.....	350
Pierce v. The State.....	329	Rogers v. Spence.....	304
Pike v. Dilling.....	409	Rogers v. White.....	405
Pittsburg v. Grier.....	510	Stone v. Cabot.....	755
Platt v. Brown.....	311	South v. Driscoll.....	425

TABLE OF CASES CITED.

IV

	PAGE.		PAGE.
Rowlandson, ex parte	247	State v. Flye	412
Russell v. Fabyan	278	State v. Graham	74
Russell v. The Jersey Co.	527	State v. Hamilton	5
Russell v. Whipple	45	State v. Hascall	481, 482
Ryan v. Fowler	502	State v. Hodge	347
		State v. Johnson	542
Sackett v. Spencer	48	State v. Moore	347
Sadler v. Henrich	501	State v. Morrill	544
Safety Life Deposit Ins. Co. v. Smith	590	State v. Pateway	779
Sallabury v. Marshall	628	State v. Pike	366, 498
Salter v. Howard	783, 787	State v. Plinistad	386
Sanborn v. Nelson	271, 272, 274	State v. Roberts	2
Saullett v. Shepherd	527	State v. Rollins	100
Savage v. Mason	797	State v. Shurtliff	438
Saville v. Robertson	234, 244	State v. Smith	778
Savill v. Roberts	293	State v. Spicer	776
Sawyer v. Vaughan	412	State v. Summers	455
Scava v. True	194	State v. Watson	5
Scholes v. Aargraves	390	Stebbins v. Jennings	124, 127
Schools v. Risley	527	Stevens v. Tufts	470
Schumler v. St. Paul	525	Stewart v. Small	454
Schuyler Co. v. People	556	St. John v. Am. Mut. Ins. Co.	558
Scott v. Carle	114	St. Joseph, etc., R. R. Co. v. Ryan	564
Scott v. London Dock Co.	380, 387	Stone v. White	77
Scott v. Shepherd	386	Stout v. Vance	80
Scarlo v. Lindsay	502	Stowe v. Heywood	306
Sears v. Lyons	277, 299, 320	Strange v. Howe	53
Segar v. Buckhamster	310	Stratton v. Staples	508
Severance v. Healey	275	Strong v. Strong	786
Seymour v. Greenleaf	689	Stuart v. People	531, 534, 543, 545
Seymour v. Greenwood	688	Supervisors, etc., v. Clark	556
Sharpe v. Hancock	783	Sutton v. Clarke	376
Sharrod v. London & N. W. Ry. Co.	386, 387	Sutton v. Temple	608, 673
Shaw v. Galt	201, 206, 287	Sutton v. Town of Wauwatosa	21
Shea v. Lawrence	455	Swann v. Broome	551
Shelton et al. v. Maupin	525	Swann v. Phillips	492
Shelton v. Pendleton	17	Sweatland v. Ill. & Mo. Tel. Co.	442
Shepley v. Felt	367	Sweet v. Cutts	366, 426
Sheppard v. Wakeman	788	Swift v. Barnes	471
ShIPLEY v. Fifty Associates	506	Sykes v. Dixon	787
Shirley v. Billings	409	Symonds v. Carter	274, 277
Shore v. Wilson	124		
Short v. West	454	Tarbox v. Eastern Steamboat Co.	412
Siewwright v. Archibald	480	Tarrant v. Webb	490, 542
Simmons v. City of Camden	593	Tate v. O. & M. R. R. Co.	628
Simmons v. Commonwealth	6	Taverner's Case	670, 673, 675
Simons v. Steele	515	Taylor v. Carpenter	307, 308, 599
Slater v. Sherman	311	Taylor v. Grand Trunk Railway	280
Slenth v. Wilson	689	Taylor v. Newman	351
Smith v. Allen	43, 43, 45	Taylor v. Railroad	284
Smith v. Billingham	471, 472	Tenney v. Prince	77
Smith v. Edgeworth	412	Tenney's Case	543
Smith v. Gowdy	497	Thayer v. Crossman	422
Smith v. Kendall	45	Thomas v. Spofford	471, 472
Smith v. London & St. Katharine's Dock Co.	509	Thompson v. Sanders	80
Smith v. Marable	658	Thompson v. Waters	632
Smith v. Smith	206, 212	Thompson v. Davenport	208
Smith v. Steele	499	Thorpe v. Rutland & Burlington R. R. Co.	612
Smith v. Swornstedt	124	Throop v. Williams	39
Smith v. Watson	253	Thurston v. City of St. Joseph	586
Smithwick v. Ward	315	Tillotson v. Cheatham	273
Snow v. Housatonic R. R. Co.	502	Tobin v. P. S. & P. R. R. Co.	558
Somosa v. Brewer	425	Tompkins v. Ashby	44
Spaulding v. Lowell	797, 798	Towle v. Blake	378, 380, 383
Spenceley v. DeWilloes	454	Towle v. Leavitt	212
Spencer v. Parry	514	Town of Stoughton v. Baker et al.	748
Spencer's Case	791, 792	Trebilcock v. Wilson	418
St. Andrew's Church Appeal	792	Trigg v. Taylor	435
Stanley v. Gaylord	383	True v. International Telegraph Co.	440, 448
Stanley v. State	9		
Stanley v. West	558	Trustees, etc., v. McConnell	555
Stanton v. Wilson	17	Trustees v. Johnson	114
State v. Bailey	746	Tuberville v. Stamp	373
State v. Bartlett	5	Tuck v. Moses	471, 472
State v. Benton	773	Tucker v. Peaslee	208
State v. Brown	5	Tufts v. Hayes	393
State v. Burlington	773, 773	Tulk v. Moxhay	792
State v. Ellis	6	Tullidge v. Wade	208, 209, 294

TABLE OF CASES CITED.

PAGE.	PAGE.
Tuitidge v. Wade.....	273
Tunney v. Midland R'y. Co.....	493
Turner v. Blaseil.....	265
Turner v. Great Eastern R'y. Co.....	500
Turner v. Railroad.....	760
Tyler v. Beacher.....	791
Tyler v. Webster.....	366
Tyler v. Western Union Telegraph Co.....	448
Tyndt v. Hartranft.....	311
Underhill v. Manchester.....	183
Underhill v. Morgan.....	74
Union Bank v. Braintree.....	77
United Insurance Co. v. Foot.....	557
United States v. Appleton.....	380
United States v. Duane.....	543, 544
United States v. Fisher.....	127
United States v. Gratiot.....	671
United States v. Gilbert.....	326
United States v. Hudson.....	542
United States v. Marchant & Colson.....	773
United States v. New Bedford Bridge.....	542
Wade v. Worthington.....	426
Wadhurst v. Dammes.....	353, 369
Walthman v. Elizee.....	45
Wakeman v. Robinson.....	333, 385
Waland v. Elkins.....	245, 250, 252
Walker v. Covar.....	717
Walker v. Cronin.....	731
Wallace v. Company.....	386
Wallace v. Jewell.....	76
Walton v. Shelly.....	431
Walton v. Waterhouse.....	666, 672, 674
Ward v. Railroad.....	760
Warner v. Erie R. R.....	494
Warner v. Price.....	81
Warren v. Chambers.....	519
Warren v. State.....	364
Warren v. Western Union Tel. Co.....	443
Washington Savings Bank v. E. Key.....	435
Waterman v. Meigs.....	464
Waterman v. Vose.....	436
Watley v. Murrell.....	749
Watson v. Brewer.....	415
Watson, ex parte.....	247, 261
Watson v. Walker.....	366
Waugh v. Carver.....	219, 226, 234, 236, 241, 244, 245, 251, 254, 260, 261, 262, 267
Way v. Foster.....	21, 22
Weaver v. Ward.....	373, 374, 383
Weed v. Panama R. R. Co.....	668
Weeks v. Milwaukee.....	399
Weems v. Mathieson.....	502
Welch v. Weason.....	21
Weid v. Bartlett.....	306
Weid v. May.....	127
Weightman v. Washington.....	728
Weiser v. Denison.....	577
Wells v. Abraham.....	596
Wells v. Head.....	356, 358, 370
Wells v. Prince.....	491
Welson v. McKreth.....	706
Wendell v. Baxter.....	109
Wendell v. Troy.....	726
Western v. McDermot.....	792
Wheatley v. Baugh.....	428
Wheeler v. Spencer.....	36, 40
Whelder v. Chappel.....	19
Whipple v. Walpole.....	273, 273, 277, 278, 282
Whitehouse v. Hansom.....	20
Whitwell v. Wells.....	470
White v. Wilson.....	447
Whittingham v. Hill.....	17
Whitney v. Hitchcock.....	325
Whitney v. Sweet.....	274
Whittaker, in re.....	267
Wiggett v. Fox.....	500, 501, 502
Wightman v. Townroe.....	249
Wilder v. Richardson.....	595
Wilford v. Berkley.....	300, 311
Wilkinson v. Frasier.....	240
Willard v. Tillman.....	663, 677
Williams v. Clough.....	502
Williams v. Currie.....	304
Williams v. N. Y. C. R. R.....	624
Wilson, ex parte.....	247
Wilson v. Mayor, etc., of New York.....	636
Wilson v. Merry.....	498, 500
Wilson v. Whitehead.....	246, 259
Winchester v. Hees.....	390
Winebrenner v. Colder.....	121
Winn v. Lowell.....	728
Winship v. Enfield.....	267
Winsmore v. Greenbank.....	783
Winsor v. The Queen.....	327
Wish v. Small.....	243
Wiswell v. First Congregat'l Church.....	123, 124, 157
Withers v. Buckley.....	527
Wonder v. Balt. and Ohio R. R. Co.....	497, 496, 502
Wood v. Braynard.....	471
Wood v. Cooper Miners' Co.....	793
Wood v. Gale.....	352
Woodman v. Hubbard.....	19, 22
Woodman v. Nottingham.....	273, 281, 283, 284
Woodman v. Thurston.....	515
Wood's Case.....	774
Woods v. State.....	454
Woodward v. Leavitt.....	455
Wood v. Watson.....	417
Woolf v. Cholker.....	349, 360
Worton v. Dawkins.....	247
Wright v. Holbrook.....	250
Wright v. N. Y. C. R. R. Co.....	502
Wright v. Ramscot.....	354
Wyatt v. Williams.....	365
Wyman v. Fox.....	460, 462
Yates v. Lansing.....	542
Yeates v. Reed.....	359
Yundt v. Hartranft.....	598

CASES

IN THE

SUPREME COURT

OF

NEVADA

EX PARTE ROBERTS.

(9 Nev. 44.)

Criminal law — uncertainty in sentence.

Where a person was sentenced to imprisonment in the State prison for a term of one year, to commence upon the expiration of another term; and one year afterward the first judgment and sentence were adjudged void; *held*, on habeas corpus, that the sentence either commenced to run immediately on rendition and had expired, or it was void for uncertainty, and in either case the prisoner was entitled to his discharge from the State prison.

HABEAS CORPUS before the Supreme Court. The writ was issued on the petition of A. C. Ellis, and directed to P. C. Hyman, warden of the State prison. In his return the respondent set forth that he held Roberts in custody by virtue of a judgment of the district court of Ormsby county, rendered on March 11, 1872, sentencing him to imprisonment for the crime of State prison breaking; that he had held him from July 11, 1871, by virtue of a sentence to a term of ten years for highway robbery; that on May 7, 1873, the judgment and sentence for highway robbery had been reversed (*State v. Roberts*, 8 Nev. 289); and that since such reversal, he had held him only under the first-mentioned judgment.

Ex parte Roberts.

The return contained a copy of the judgment and sentence, from which it appeared that Roberts was one of a number who had escaped from the State prison on September 17, 1871. Being afterward apprehended and indicted for prison-breaking, they pleaded guilty and were sentenced to imprisonment in the State prison for the term of one year, "such term of imprisonment to commence upon the expiration of any term or terms of imprisonment which you may now be undergoing in said State prison."

Ellis & King, for petitioner.

L. A. Buckner, attorney-general, for respondent. I do not see how it can be a question in this case whether the judgment for robbery was void or voidable. From an inspection of that judgment, there is no doubt that the district judge had jurisdiction of the subject matter of the indictment and of "the person of the defendant." That judgment was not void, but only voidable. *Ex parte Tobias Watkins*, 3 Peters, 202. It was in force, however erroneous, until reversed. *Brown v. Commonwealth*, 4 Rawle, 259. A year has not expired since that reversal, and petitioner is therefore not entitled to his discharge.

BELKNAP, J. Under a judgment of conviction for prison-breaking, the petitioner was, on the 11th day of March, 1872, sentenced to confinement in the State prison for the period of one year, to commence upon the expiration of a term of imprisonment which he was then undergoing for robbery. The trial of the robbery case was had out of term, and upon appeal we decided that the judgment of the district court rendered therein was void and ordered a new trial. *State v. Roberts*, 8 Nev. 239. The petitioner is confined in the State prison. Application is made for his release by writ of habeas corpus, upon the ground that the judgment of the 11th of March, 1872, is void for uncertainty, since it depends upon an impossible condition, or that the sentence thereunder commenced running upon its rendition, and has now expired by limitation.

In behalf of the State, it is contended that the sentence of the 11th of March, 1872, took effect upon the 7th day of May, 1873, the date of the reversal of the judgment in the robbery case. The decision of this court did not make that judgment void; it was void *ab initio*, and the sentence and imprisonment under it were,

State v. Newman.

in legal contemplation, nullities. Either the judgment of the 11th of March commenced to run upon its rendition or it is void for uncertainty, and in neither case is the warden of the State prison entitled to the custody of the prisoner. A new trial having been awarded him, he must be remanded to the custody of the sheriff of Washoe county.

It is so ordered.

STATE v. NEWMAN, appellant.

(9 Nev. 42.)

Larceny — of property stolen in and brought from another State

If a person commits larceny in one country or State and carries the goods stolen into another country or State and there makes any removal or asportation of them, having in his mind the intent to steal, he may be properly indicted for larceny of them in the latter locality.

DEFENDANT was indicted with Vincent Moore and Robert McCausland, of the crime of grand larceny, alleged to have been committed in Lincoln county, Nevada, on or about May 15, 1872, by stealing a cow and heifers, the property of John Pulciver, and a heifer, the property of the Hebron Stock Association. It appeared that the cattle described had been pasturing on a ranch in Utah territory, from which they were stolen and driven to a ranch in Meadow Valley, Lincoln county, where they were found.

Defendant alone appeared for trial. Having been convicted and his motion for a new trial overruled, he was sentenced to imprisonment at hard labor, in the State prison, for the term of three years. He appealed from the judgment.

Pitzer & Corbin, Bishop & Sabin, and J. C. Foster, for appellant.

L. A. Buckner, attorney-general, for respondent. 1. An indictment for larceny can be supported where property is originally stolen in one of the United States and carried into another, where the indictment is found. This question was thoroughly discussed in

Massachusetts in *Commonwealth v. Upsichord*, Lead. Crim. Cas., 371, and *Commonwealth v. Holder*, 2 id. 377. These cases have been followed in Connecticut, Maryland, Vermont, Ohio, Mississippi, and Kentucky. A contrary doctrine has been held in North Carolina, New York, Tennessee, Louisiana, Indiana, Iowa and New Jersey. The question in the case at bar, however, differs from that discussed in the cases above referred to. Here the indictment charges the larceny to have been committed in Lincoln county, Nevada. There is therefore no analogy between this case and that of *Simmons v. Commonwealth*, 5 Binn. 617, cited by appellant. There the Pennsylvania jury found, by special verdict, "that the defendant did feloniously steal, take, and carry away the goods * * * within the State of Delaware, and that he brought them into the city of Philadelphia." The judges properly refused to sentence the prisoner under those circumstances, while doubtless the facts would have warranted a conviction and sentence for larceny in Pennsylvania. See 1 Bish. Crim. Law, 106, § 106. Here the evidence established the facts, in addition to possession, that he had no right to the possession and that he had the felonious intent to appropriate the cattle to his own use, and did so by selling them. This established the complete offense in Lincoln county, Nevada.

2. In the New York cases of *People v. Gardner*, 2 Johns. 478, and *People v. Schenck*, 2 id. 479, it was held that where the original theft was in another State, and the stolen property brought into the State where the indictment was found, it could not be supported; but it will be remarked that those cases were on common-law grounds. Afterward a statute was enacted in that State, embodying the contrary or Massachusetts view.

3. The first instruction was not erroneous. If the testimony showed that the original taking was in Utah, and that in addition to the guilty possession, the defendant feloniously appropriated the said property to his own use, knowing who the real owner was, *these facts* made a distinct offense against the laws of this State, triable in Lincoln county. 1 Bish. Crim. Law, 108.

WHITMAN, C. J. The appellant was convicted of grand larceny. It was shown by the evidence, so far as there was any showing, that the property, the subject of the larceny, was stolen in Utah Territory. The indictment was for larceny in Lincoln county, State of Nevada.

State v. Newman.

This state of facts brings up the often and variously decided objection, that no conviction can be had, in one State of this Union, for a larceny committed in another or in a territory thereof. Thus badly put, of course no authority could be found to sustain; but convictions have been had upon the principle which allows one stealing in a county of a State to be indicted and tried in any other to which he carries the stolen property, upon the ground that, the title being in the true owner, every moment's continuance of felonious possession is a new crime under the same law. *State v. Brown* 8 Nev. 208. As every State of this Union is, as to its laws and their administration, a foreign country to every other, there can be no analogy between the cases; and thus, despite the very considerable authority in affirmation of this proposition, the weight of precedent and reason is against it. In Massachusetts and other States where the doctrine prevails, it is evidently held more because the rule is established; while the reason is clearly with the dissenting judges. *Com. v. Holder*, 9 Gray, 7; *State v. Ellis*, 3 Conn. 185; *State v. Hamilton*, 11 Ohio, 435; *State v. Bartlett*, 11 Vt. 650.

The true reason and authority, however, for an indictment and the rule upon which it can be sustained under facts similar to those of the present record, have been well elucidated by Mr. Bishop in his chapter on "Acts punishable equally by our government and by a foreign government," and to some extent the same were foreshadowed in *The State v. Watson*, 36 Miss. 593 and *Com. v. Ferrill*, 1 Duvall, 153. As it is impossible to condense the argument of the text writer, so perfectly crystalized is it, the whole will be quoted, although more comprehensive in scope than is absolutely necessary for this decision.

"Under the last two sub-titles this matter was somewhat considered; but it may be well to observe here, that supposing an act to be equally punishable by two sovereignties it does not necessarily follow that both sovereignties will deem it wise to execute the punishment—a matter to be further considered elsewhere. On the other hand, if an act is properly punishable by another sovereignty, yet the foreign sovereign does not see fit to avail himself of his right to punish it, this liability of punishment abroad furnishes no good reason why we should not punish it when it has been committed in violation of our laws.

"But when we come to the application of these principles, we sometimes meet with differences and embarrassments. Particularly

have conflicting opinions been entertained whether, if a man commits larceny of goods in one country, or in one State of our Union, and carries the goods into another country or State, he can be indicted for larceny of them in the latter locality, in analogy to the rule which holds where goods are stolen in one county, and carried by the thief into another one within the same State. Now, this form of the question, being the common form, betrays the misapprehension out of which the differences have arisen. Our courts cannot punish offenses against a foreign government; neither can a man excuse himself for a criminal act here, by alleging that he did the same thing elsewhere. From which propositions we conclude, that as a question of principle, a man can neither be punished nor escape punishment for a larceny here, by reason of his having committed it also in another State or country.

"Therefore, when a jury sitting in Pennsylvania, found by special verdict 'that the defendant did feloniously steal, take, and carry away the goods * * * within the State of Delaware, and that he brought the same into the city of Philadelphia, within the jurisdiction of this court,' the judges properly refused to sentence the prisoner (*Simmons v. Commonwealth*, 5 Binn. 617), while doubtless the facts would have justified the jury in convicting him of larceny in Pennsylvania. Always, when a man has with him property in the State where the inquiry arises, the courts look into the legal relation he sustains to it there; if he stole it in another State, he has not even the right to its custody in the new locality, and the rule of larceny is, that when a man, having in his mind the intent to steal, makes any removal or carrying away of goods to the custody of which he has no title, he commits the crime. Consequently, in the above case, the finding by the jury of a larceny in Delaware was irrelevant; while, in omitting to say whether there was a removal of the goods by trespass with intent to steal them in Pennsylvania, it was defective.

"The question now under consideration differs in one aspect from that of goods stolen in one county and conveyed by the thief into another county within the same State. In another aspect it is the same question. No indictment can ever be maintained, unless the proof establishes a complete offense in the particular county in which the indictment was found. But where the first taking was in the same State, though in another county, the court can see the relation of the thief to the property, after he brings it

State v. Newman.

into the county of the indictment, to be that of a felonious possessor; and so can infer a larceny in the latter county, from the mere fact of possession. Yet where the first taking is abroad, no such inference can be drawn from the mere possession; while, if inquiry establishes something done in this State, beyond merely having possession here, then the fact of there being in the possessor here no right to the possession, to the custody, or to any handling whatever of the property, added to the proof of intent to appropriate it wrongfully here, with the knowledge of the ownership being in the other, establishes the complete offense. Our courts, indeed, have no occasion to try, neither have they jurisdiction to try, larcenies committed abroad against the laws of foreign governments. But they can try all offenses against our laws; and if a man has property in his hands here, they can inquire what legal relation he sustains here to this property; and if it came with him from a foreign country, the relation he sustained to it there establishes his relation to it here. This is familiar law, undisputed, practiced upon daily in all our tribunals in the ordinary matters of litigation.

“The proposition that a man is to escape punishment for the violation of our laws, because he first violated the laws of a foreign country, is absurd in itself and mischievous in its practical application. Nothing is plainer than that, when a man is found here with property, our courts will inquire after the owner of it, equally whether such owner is alleged to be a foreigner or a citizen, present personally or absent. Nothing is plainer than that our courts will protect the rights of property, equally whether the property is in the owner's grasp, or wrongfully found in the grasp of a felon. And no principle in the law of larceny is better established, as a general doctrine, than that any physical removal, however slight, of the entire physical substance of the thing alleged to be stolen, to which physical substance the remover has not the right of possession, even though he has it in custody, lawfully or unlawfully, is, where the felonious intent exists, larceny. If, therefore, the complete offense is not committed here, by one bringing here from a foreign country personal goods which he has there stolen, using them there as his own and meaning at the same time here to deprive the owner of his ownership therein, then it is impossible for any man, under any circumstances, to do acts completely falling within all the descriptions and definitions given in the books of this offense.

"When we turn to the authorities, we find that they have not always proceeded on the principles thus stated. In an old English case, where goods seized piratically on the ocean were carried by the thief into a county of England, the common-law judges refused to take cognizance of the larceny, and remitted the matter to the Admiralty; 'because,' said they, 'the original act, namely, the taking of them, was not any offense whereof the common law taketh knowledge, and, by consequence, the bringing of them into a county could not make the same felony punishable by our law.' *Butler's Case* cited 13 Co. 53; 3 Inst. 118. And the doctrine has been since applied, in England, both to goods stolen in other parts of the king's dominions (altered by Stat. 13 Geo. III. ch. 31, §§ 4, 7 and 8; Geo. IV. ch. 29, § 76), and stolen in foreign countries. This doctrine has been followed by the courts of New York, Pennsylvania, North Carolina, Tennessee, Indiana and Louisiana. It has been discarded and the opposite held in Connecticut, Vermont, Ohio and Mississippi. In Massachusetts, the court discarded it also, holding defendants liable where the facts showed the original larceny to have been in another of the United States; but, in a late case, where it was in one of the British Provinces, the conviction was overthrown. *Com. v. Upsichord*, 3 Gray, 434. The rule which holds the criminal guilty in the State to which he brings his stolen goods has likewise been prescribed by statute in New York since the before-mentioned adjudication was made; also in Alabama, Missouri, and some other States." 1 Bishop's Crim. Law, 3d ed., §§ 104-110.

Accepting, as is here done, the foregoing quotation as a correct exposition of the law, the first objection must fail.

The next objection is to the first instruction presented in the record, as follows: "Gentlemen of the jury, you are instructed that if you find from the evidence that the defendant was in possession of the cattle charged to have been stolen in the indictment, with a felonious intent to steal, take, and drive away the same, in the county of Lincoln, State of Nevada; and that, if you further believe from the evidence that the property belonged to the persons alleged in the indictment to be the owners thereof, and that the property was of the value of fifty dollars or more, then you will find the defendant guilty as charged in the indictment, though the original taking may have been in Utah Territory." This instruction was evidently drawn with reference to the old doctrine before

State v. Newman.

alluded to, as sustained in Connecticut and other States, and would probably have thereunder been good; but in view of the reason on which this decision stands, it is insufficient. Succinctly stated, it amounts to the proposition that A in possession of the property of B "with felonious intent to steal, take, and drive away the same," is guilty of larceny. This is not enough; as under the facts and law here, there is, and can be, no previous larceny, from which to deduce by mere possession of the stolen property, though coupled with felonious intent, a continuing one. A larceny under the circumstances of this case must be complete in itself, upon its own surroundings; there is no convenient legal fiction to help out the halting fact; and of course it is a self-evident proposition in the abstract that the mere possession of another's property, with intent to steal, is no larceny, until that intent is ripened into act; and so here, to repeat the author before quoted, "where the first taking is abroad, no such inference can be drawn from the mere possession; while if inquiry establishes something done in this State, beyond merely having possession here, then the fact of there being in the possessor here no right to the possession, to the custody, or to any handling whatever of the property, added to proof of intent to appropriate it wrongfully here, with a knowledge of the ownership being in the other, establishes the complete offense." This instruction then was erroneous. There is nothing in the other objections; but upon this the judgment must be reversed and the cause remanded. It is so ordered.

Judgment reversed.

NOTE.— See *Stanley v. State*, 15 Am. Rep. 604; *People v. Williams*, 9 id. 112.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

CONNOR V. SULLIVAN.

(40 Conn. 26.)

Adverse user — interruption of — question for jury.

A single instance of attempted interruption of an adverse user, resulting in no actual interruption, and followed by no attempt to test the right, does not necessarily destroy the presumption of a grant founded upon a user in other respects sufficient. Such a fact is to be submitted to the jury, with all the circumstances attending it, to have its natural and proper weight according to those circumstances, upon the question whether the user fairly indicates a grant.

TRESPASS *quare clausum fregit*. Defense, a right of way. To sustain the defense, the defendant proved that he and his grantor had passed over the premises for a continuous period of more than fifteen years, claiming a right of way adversely to the claim of the plaintiff. Plaintiff thereupon proved that soon after defendant began the adverse user he forbade him using the way, and commenced putting up a fence to prevent him passing over the premises, but that the defendant threatened to pull down such fence, if erected, and did, in fact, remove a post set for the purpose of making the fence, and by his threats prevented the building

Connor v. Sullivan.

of the fence. The opinion states the other facts. The defendant had judgment, and plaintiff moved for a new trial.

Thresher, for motion.

Pratt and Swan, *contra*.

SEYMOUR, J. The defendant claimed a way over the plaintiff's land by user, the issue being to the court. The judge finds that the defendant and his grantor had used the way continuously for a period of more than fifteen years under a claim of right adversely to the claims of the plaintiff and his grantors. The issue is thereupon found for the defendant.

The plaintiff asks for a new trial by reason of the following facts. In 1861 the plaintiff's grantor forbade the defendant using the way, and commenced putting up a fence to prevent the use. The defendant told him that if he erected the fence he would tear it down, and did pull up a part of the fence which had been set in the ground, and by threats drove him away and prevented him from erecting the fence.

The court ruled that these acts and declarations of the plaintiff's grantor, not being followed by suit or any proceedings to test the title to the premises, would not prevent the defendant from gaining a right of way over the same.

The question for us to decide is, whether this ruling of the court below is or is not correct.

The ultimate question in the Court of Common Pleas was one of fact — whether, upon the user proved, a grant of the way was fairly to be inferred. The occurrences of 1861, above stated, were important and relevant facts, bearing upon the issue which the court was to pass upon. The testimony regarding these occurrences was not rejected as immaterial, but being received and weighed, the court refused to treat them as of controlling effect, so as in point of law to destroy the presumption of a grant of the way which the adverse and continued user of fifteen years was held to prove.

We are by no means disposed to facilitate the acquisition of rights of way by mere user. We are satisfied that injustice is sometimes done in the application of the rules of law on this subject, and we are not sure that upon the facts as shown by this record we should have come to the same conclusion which was reached in the Court of Common Pleas. But all the cases agree

that the existence of the supposed lost grant on which the way is claimed, is a question for the jury, and the jury are warranted in finding the issue in favor of the right of way, if the user has been for fifteen years continuous and adverse and uninterrupted. They are also, on the other hand, warranted in finding against the right of way if the user has not been peaceful and acquiesced in; *pacifica et per patientiam via domini*. But we think it has never been held that an isolated instance of attempted interruption of the user, resulting in no actual interruption, and followed by no attempt to test the right, would, as matter of law, necessarily destroy the presumption of a grant founded on a user in other respects sufficient. The most that the owner of the land can claim for such an attempted interruption is that it should be submitted to the jury, with all the circumstances connected with it, to have its natural and proper weight, according to those circumstances, upon the main question, to wit, whether the user fairly indicates the existence of a lost grant. The plaintiff in this case made an effort to interrupt the defendant's use of the way, but desisted from the effort when he found the defendant resolute in asserting his right. No explanation being offered, the plaintiff seems to have concluded to acquiesce in the defendant's claim of right. Such an acquiescence after a feeble struggle seems more significant than it would have been without such brief contest. The plaintiff's conduct was undoubtedly open to proof and explanation. If there were circumstances in the relative position of the parties indicating that the plaintiff's free action was controlled by fear, or that he was too poor to enforce his rights at law, that might have been shown. So on the part of the defendant, evidence would have been admissible to show that the plaintiff desisted from his attempt at interruption because on inquiry he became satisfied that the defendant's rights were such that they could not successfully be contested.

The case of *Powell v. Bagg*, 8 Gray, 441, was cited by the plaintiff's counsel as holding that any act of the plaintiff contradicting the supposed right of the defendant, however transient and however speedily abandoned, is sufficient to interrupt the user and prevent the acquisition by user of the right of way, and as further holding that the law gives an artificial value to such an act, making it, as matter of law, conclusive of the question. We have examined that case with the care due to the learned court by which it was decided. Great weight is there given to what appears to have been

an isolated case of attempted interruption, by mere words, of the right claimed, but the point decided by the court is merely that the evidence of the forbidding was to be submitted to the jury, and the jury would be warranted in finding against the right claimed upon that evidence.

There is also in the Virginia reports a well-reasoned case (*Nichols v. Aylor*, 7 Leigh, 546), in which considerable force is given to the complaints of the owner of the land of the injury done him by the user under which a right was claimed; but the question is treated as one of fact and not of law, and it is not intimated that such complaints alone are, as matter of law, conclusive against the user to prevent the acquisition of the right.

The recent English cases are governed by the statute of William IV, but before that statute, in the case of *Livett v. Wilson*, 3 Bing. 115, the evidence showed that the alleged right had been pretty constantly contested, and yet the matter was left to the jury, with no such instructions, as the plaintiff here claims, in regard to the effect of the contest.

The case of *Raton v. Swansea Water-works Company*, 17 Adol. & El. (N. S.) 267, arose under the statute of William IV, but the effect at common law of a contest regarding the right claimed by user is discussed, and the whole discussion proceeds upon the idea that the contest is a proper subject for consideration by the jury, to have its natural weight as evidence, and nothing more. There the servant of the party claiming a right by user had been sued for exercising the right. The plaintiff's son, by the plaintiff's direction, attended the trial, and paid a fine imposed under a local act. Such a contest thus successfully waged would seem to be very decisive against the acquisition by uninterrupted user of the right claimed, but the judge at *nisi prius* rejected the evidence. The Court of Queen's Bench granted a new trial, on the ground that the evidence ought to have been submitted to the jury.

We have no jurisdiction to review the decision of the Court of Common Pleas upon a mere question of fact, and we are satisfied that the law does not pronounce against the defendant's acquisition of a right of way by user, merely because the plaintiff made the unsuccessful attempt which he did make to interrupt the defendant in the exercise of the right which the latter claimed.

A new trial is not advised.

In this opinion the other judges concurred.

MEAD V. CITY OF NEW HAVEN.

(40 Conn. 12.)

Municipal corporation — Liability of, for negligence of appointees.

A city, in pursuance of its charter, appointed an inspector of steam boilers within the city, and by by-law imposed a penalty upon any person who should use such a boiler, without having it tested by the inspector. *Held*, that the city was not liable for the negligence of the inspector in the discharge of his duty — he being an agent of the State and not of the city.

TRESPASS on the case for an injury alleged to have been occasioned to plaintiff's steam boiler through the negligence of an inspector of boilers appointed by the defendant. The court found the following facts:

The plaintiff was the owner of a stationary steam boiler, which he was about to use in connection with a manufacturing business within the corporate limits of the city of New Haven, but which, under the by-laws of the city, he was not at liberty so to use until it had been inspected and approved by the board of supervisors, a board created under the charter and by-laws of the city, for the supervision of stationary steam boilers. An inspector of stationary steam boilers, who had been duly appointed to that office by the board of supervisors, and who then held the office, undertook the inspection and test of the plaintiff's boiler, using for that purpose the boiler tester and apparatus belonging to the city and kept by them for such use. The inspector, in making the inspection and test, by his negligence and failure to exercise reasonable and proper care, subjected the boiler to unusual, unnecessary and unreasonable pressure, thereby breaking and injuring the same, to the damage of the plaintiff.

If, upon the facts found, the defendants were legally liable to the plaintiff, the court found that the plaintiff was entitled to recover \$400 damages.

Upon this finding of facts the case was reserved for the advice of this court.

Watrous and Twiss, for plaintiff. 1. By virtue of its charter the city passed by-laws, imposing heavy penalties upon any person who

Mead v. City of New Haven.

should erect and use stationary steam boilers within its limits, without first having such boilers tested by an officer appointed, and apparatus furnished, by the city. Having taken this action and assumed upon itself the task of testing such boilers, the city became liable to any party injured, in his private property, by the negligent, unreasonable or improper use of that power. *Bailey v. Mayor, etc., of New York*, 3 Hill, 531, 539; *Mayor, etc., of New York v. Bailey*, 2 Denio, 433; *Mayor, etc., of New York v. Furse*, 3 Hill, 616; *West v. Trustees of Brockport*, 16 N. Y. 161; *Delmonico v. Mayor, etc., of New York*, 1 Sandf. 222; *Rochester White Lead Co. v. City of Rochester*, 3 Comst. 468; *City of Dayton v. Pease*, 4 Ohio St. 80; *Ross v. City of Madison*, 1 Carter, 281; *Jones v. City of New Haven*, 34 Conn. 1.

2. The testing and supervision of stationary steam boilers is a private duty, assumed by the city, especially for the benefit of its own citizens, and in which the public at large have no more interest than in trimming trees in the public parks, or the proper construction of sewers, and is in no sense a governmental duty, as the extinguishing of a raging fire or the quelling of a riot. These latter are matters in which the whole public are interested. Nor is such testing a duty imposed upon the city, without its consent, express or implied, as the repair of highways. *Conrad v. Trustees of Ithaca*, 16 N. Y. 158; *Child v. City of Boston*, 4 Allen, 54; *City of Chicago v. Robbins*, 2 Black, 418; *City of Chicago v. Powers*, 42 Ill. 169; *Jewett v. City of New Haven*, 34 Conn. 368; *Lloyd v. Mayor, etc., of New York*, 5 N. Y. 369; *Lacour v. Mayor, etc., of New York*, 3 Duer, 406; Abbott's Dig., Law of Corp. 524, 533, and cases cited; *Shearm. & Redf. on Neg.*, § 139, with cases there cited.

3. This is either a special power granted to the city at its request, out of which a public duty grows, or it is a special duty not belonging to it, under the general law, but imposed upon it with its consent; and therefore, if the city is guilty of negligence in the discharge of such duty, thereby causing injury to another, the city is liable to the party injured. *Henley v. Mayor of Lyme*, 5 Bing. 91; *Bigelow v. Randolph*, 14 Gray, 543; *Conrad v. Trustees of Ithaca*, 16 N. Y. 158; *West v. Trustees of Brockport*, id. 161; *Jones v. City of New Haven*, 34 Conn. 1.

Ingersoll, with whom was *Wright*, relied upon *Jewett v. City of New Haven*, 38 Conn. 368; S. C., 9 Am. Rep. 382.

SEYMOUR, J. The plaintiff insists that the inspector of boilers is to be regarded as the servant of the city, and that the city is therefore liable for his negligence while acting in its service. He was appointed by a board created under the charter and by-laws of the city for the supervision of stationary steam boilers within the city limits. The defendants claim that the inspector is to be regarded as a public officer, appointed indeed by the city, but discharging the same duties as those imposed by statute law upon similar inspectors appointed by the governor in pursuance of title 34, section 34, of the Revised Statutes.

The State has seen fit to attempt by legislation to secure the safety of steam boilers within its limits, and for this purpose has provided for the appointment of inspectors in the several congressional districts into which the State is divided. If the legislature had provided for the appointment of inspectors by the several cities within their respective limits, by the same statutes under which the governor acts in making similar appointments, it would be difficult to maintain that the city would be liable for the inspector's negligence, without also maintaining that the governor would likewise be liable for the negligence of his appointees. Both the city and the governor would be acting in the discharge of a public duty, and the duties to be performed by the person appointed are also public. The duty of inspection of boilers is recognized by the statute as governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or who may be exposed in any way to danger from its unsafe condition.

The city of New Haven as such has no pecuniary or individual or private interest in the matter, and although the power of the city over the subject is conferred by the charter and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the State and not for itself in making the appointment of inspectors, and therefore not liable for the inspector's negligence.

Judgment is advised for the defendants.

In this opinion the other judges concurred.

ST. JOHN'S PARISH V. BRONSON.

(40 Conn. 73.)

Husband and wife — necessities — religious instruction — Liability of husband for pew rent.

In an action to recover the rent of a church pew hired by defendant's wife, held, that a pew is not included in the list of articles known as necessities, and that the husband was not liable therefor.

ASSUMPSIT for the rent of a pew in plaintiff's church. Defense that the pew was hired by defendant's wife, and occupied by her and defendant's daughter without his authority or assent. The instruction of the trial-judge is stated in the opinion. Verdict for the plaintiff.

H. B. Munson and Terry, in support of motion.

Webster, with whom was *O'Neil*, contra.

PARK, J. Contrary to the request of the defendant, the court charged the jury that the rent of a pew, in a church where divine worship is held and religious instruction given, is included in the list of articles known to the common law as necessities, and the question is, whether this instruction is correct?

It is said in the books that necessities consist only of food, drink, clothing, washing, physic, instruction, and a suitable place of residence. *Shelton v. Pendleton*, 18 Conn. 417; *Whittingham v. Hill*, Cro. Jac. 490; *Clancy on Husband and Wife*, 23; 2 Kent's Com. 146; *Finch*, 103; Co. Lit. 172, a; 1 Woodeson's Lect. 402; *Bingham on Infancy*, 87; *Baker v. Lovett*, 6 Mass. 80; *Munson v. Washband*, 31 Conn. 303.

By instruction is here meant some degree of education as taught in the schools. *Stanton v. Wilson*, 3 Day, 37; *Metc. on Cont.* 69; *Middlebury College v. Chandler*, 16 Vt. 683.

There is but little found in the English reports concerning instruction given to an infant as included in the term "necessaries." However, it seems to have been regarded that instruction in reading, writing and the common branches of school education are to be so considered. 1 Sid. 112; *W. Jones*, 182.

Frost v. Plumb.

No case can be found either in England or in any of the United States where the definition of instruction has been carried so far as to include religious instruction. And indeed in this country, where there is no established church and every one is permitted to worship God according to the dictates of his own conscience, no distinction could be made among the thousand different tenets and precepts that are taught upon the Sabbath under the name of religious instruction.

The principle would have to be carried, if carried at all, so far as to include all divine worship and all religious instruction of every name and nature tolerated by the constitution, for that instrument declares that "no preference shall be given by law to any christian sect or mode of worship."

Hence it is obvious that the object which the supporters of this doctrine have in view would not be accomplished by including religious instruction in the list of necessities.

Furthermore, it might well be questioned whether the seventh article of the constitution, which declares that no person shall be compelled by law to support any congregation, church, or religious association, does not forbid the adoption of this doctrine; but we forbear pursuing the subject further.

The view we have taken of this question renders it unnecessary to consider the other questions made in the case, and we therefore leave them as we find them.

A new trial is advised.

In this opinion the other judges concurred.

FROST V. PLUMB.

(40 Conn. 111.)

Sunday — injury to horses hired on.

Defendant hired a horse of plaintiff on Sunday to go to a certain place. He went further and killed the horse by over-driving. *Held*, that he was liable in trover.

One who hires and drives a horse upon the Sabbath, and while so driving it, causes its death either willfully or negligently, is liable to the owner in an action of trover. Per CARPENTER, J. (*See note*, p. 28.)

Frost v. Plumb.

TROVER and case for the value of a horse. The opinion states the case.

O'Neil, with whom was *Webster*, in support of motion.

H. B. Munson, contra.

CARPENTER, J. The defendant hired a horse of the plaintiff to drive from Waterbury to Southington on Sunday. He drove, or permitted others to drive, the horse some ten miles beyond Southington. The weather was excessively hot, and it is claimed that the extra distance, coupled with immoderate driving, caused the horse's death. This action, trover and case joined, is brought to recover the value of the horse.

The court instructed the jury "that if the owner of a horse knowingly lets him on the Lord's day, to be driven to a particular place, but not for any purpose of necessity or charity, and the hirer injures the horse by immoderate driving, in consequence of which he afterward dies, the owner cannot maintain an action against the hirer for such injury, although it occurs while going to a different place, and beyond the limits specified in the contract." The jury returned a verdict for the defendant, and the plaintiff moved for a new trial. The Superior Court reserved the case for our advice.

The court in its charge was governed by the case of *Gregg v. Wyman*, 4 Cush. 322. In Maine and New Hampshire the doctrine of that case is repudiated, and the law is declared to be otherwise. *Morton v. Gloster*, 46 Me. 420; *Woodman v. Hubbard*, 5 Foster, 67. In *Whelden v. Chappel*, 8 R. I. 230, the court followed *Gregg v. Wyman*. But in a late case, which has come to our knowledge since this case was decided (*Hall v. Corcoran*, 107 Mass. 251; S. C., 9 Am. Rep. 30), *Gregg v. Wyman* is expressly overruled. In that case the defendants hired a horse and sleigh on Sunday to drive from South Adams to North Adams for pleasure, the plaintiff knowing the purpose for which the team was hired. After reaching North Adams they drove to Clarksbury, and on their return the horse and sleigh were injured. The court held unanimously, granting a new trial, that the defendants were liable. Mr. Justice GRAY, in giving the opinion of the court, says: "It therefore appears to us to be clear, upon principle and authority, that an action

of tort for the conversion of the horse, by driving it beyond the place agreed in the illegal contract of letting and hiring, is not founded on that contract. And we think it is equally clear that that contract need not be shown by the plaintiff, and forms no part of his cause of action." Thus it will be seen that the law of Massachusetts on this subject is now in substantial harmony with the law of Maine and New Hampshire. We think that the law of this State ought to be, and is, the same. The charge of the court, therefore, that the defendant was not liable, although the injury occurred in going to a different place, and beyond the limits specified in the contract, was clearly erroneous. We understand the rule to be this: the plaintiff cannot recover whenever it is necessary for him to prove, *as a part of his cause of action*, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover. Apply that rule to this case. It was only necessary for the plaintiff to prove his own title to the property, and a conversion by the defendant. The destruction of the horse was a conversion; and proof that the injury which caused his death occurred while being driven without the consent of the owner, shows a complete cause of action, without any reference to an illegal contract.

The illegal letting may or may not appear. If it does, it simply explains the defendant's possession, and proves that it was by the owner's permission, at least for a certain purpose. It may give the defendant an opportunity to injure the horse, but it does not cause the injury; nor does it contribute to it in such a sense as to make the plaintiff a party to the wrongful act. If it does not appear, before the defendant can avail himself of it as a defense, it becomes necessary for him to prove the illegal contract to which he was a party, and his own illegal conduct in traveling upon the Sabbath. But he can no more avail himself of that as a defense than the plaintiff can as a cause of action. Either party, whose success depends upon proving his own violation of law, must fail.

As the charge to the jury was manifestly in conflict with these principles, the Superior Court must be advised to grant a new trial.

Frost v. Plumb.

Perhaps we might with propriety stop here. But there is another question involved in the case which may be important in another trial. It seems that the court excluded evidence of improper driving in going to, and beyond, the place specified in the contract. We have just seen that the defendant is clearly liable for the latter. It becomes an interesting inquiry how far he is liable for the former.

In *Way v. Foster*, 1 Allen, 408, it was held that the defendant in a similar case was not liable, on the ground that the immoderate driving was virtually a breach of his contract. In *Welch v. Wesson*, 6 Gray, 505, it was held that the plaintiff might recover for an injury done to his property, while he and the defendant were engaged in trotting horses for money, contrary to statute. The distinction between the two cases seems to be, that in the former there was a bailment, and the misfeasance of the defendant was a breach of his duty as bailee; while in the latter, the act of the defendant in running the plaintiff down was a wrongful act, independent of any contract. It seems to us that the difference between the two cases is more apparent than real. No express contract was violated in either case. An implied contract therefore must be relied upon; and there seems to be quite as much reason for saying that the defendant in one case agreed to act fairly in the race, as that the defendant in the other agreed to drive the horse properly. Strictly speaking, it was not a matter of actual agreement in either case. In each case the act of the defendant was a violation of a duty imposed by law; in the one, a duty of universal obligation, to do his neighbor no wrong; in the other, a specific duty imposed by the law of bailments.

If the usual test, whether the plaintiff can prove his cause of action without proving the unlawful agreement, be applied, are not the plaintiff's chances quite as good in the case of a bailment as in the other case? In one case the plaintiff proves that the defendant wrongfully injured his horse while the parties were driving side by side; in the other, the plaintiff proves that the defendant wrongfully injured his horse while driving him by his consent. If the circumstances of the race are unimportant, so the nature and character of the bailment are immaterial. In each case the tort, and not the contract, is the gist of the action.

But a determination of the precise question decided in *Way v. Foster* is unnecessary in the present case. The immoderate driving

during the bailment, of itself, or in connection with the improper driving after the bailment terminated, caused the death of the horse. There can be no doubt that the general rule is that an action of trover will lie in such a case, and that the plaintiff in this case is entitled to recover, unless the letting the horse on Sunday is a bar to a recovery. In each of two cases cited above (*Woodman v. Hubbard*, 5 Foster, 67, and *Hall v. Corcoran*, 107 Mass. 251; S. C., 9 Am. Rep. 30), the wrongful act which resulted in the death of the horse occurred after the bailment had terminated; but much of the reasoning of the court applies as well to a destruction during the bailment, as to a destruction afterward. In the latter case, the court carefully avoids overruling *Way v. Foster*, and suggests the only distinction by which the two cases can be reconciled, and that is the difference between an action of tort in the nature of an action of trover, and an action of tort for abusing the horse while driving to the place for which he was hired.

On the whole we regard the cases cited above as authorities for holding that a party who hires and drives a horse upon the Sabbath, and, while so driving it, causes its death, either willfully or negligently, is liable to the owner in an action of trover. We think, also, that the law thus stated can be fully vindicated upon principle. The plaintiff, in making a contract prohibited by law, exposed himself to all its legitimate consequences. He is not only liable to the penalty, but the law will refuse to aid him in enforcing it, or in recovering compensation for a breach of it, and will not allow him to recover in any action which essentially depends upon it. But it does not, in a case like this, deprive the owner of his general property in the horse, nor place him, or his property, outside of the protection of the law. Nor will it in any sense operate to justify or excuse the other party in the commission of any wrongful act not contemplated by the agreement. Now it must be conceded that an action of trover is not founded upon a contract. None is referred to in the declaration, and none need be proved on the trial. All that the plaintiff is required to prove is title in himself, and a conversion by the defendant. In this case the title is not in dispute. And when the plaintiff proves that the defendant was driving his horse from Waterbury to Southington, and that while doing so he willfully or negligently drove him in such a manner as to cause his death, is not his case fully proved? It is quite immaterial how the horse came to be in the defendant's possession.

Austin v. Bristol.

Whether lawfully or unlawfully is not of the slightest consequence. He may have found him in the highway; he may have hired him of a stranger; he may have taken him from the plaintiff's stable, with or without leave, upon a week day, or upon the Sabbath; it is all the same. The plaintiff is bound to offer no proof on the subject. If the defendant would derive any benefit from the illegal contract, *he* is the one to prove it; and when he attempts to do so, he is met with the objection that he cannot avail himself of an illegal transaction, in which he participated, as a defense to the action.

For these reasons we are of the opinion that it was competent for the plaintiff to prove the misconduct of the defendant both before and after reaching Southington; and that if either, or both, caused the death of the horse, the plaintiff is entitled to recover.

A new trial is advised.

In this opinion the other judges concurred.

NOTE.—Compare *Parker v. Latner* (60 Me. 523), 11 Am. Rep. 210, wherein it was held that where a horse was let for a pleasure drive on Sunday, and was injured by negligent and careless driving during the continuance of the ballment, an action on the case was not maintainable. As to the right of a person to recover for injuries received from defects in the highway while traveling on Sunday, see *Cratty v. City of Bangor*, 2 Am. Rep. 56 (57 Me. 423); *McClary v. Lowell*, 8 id. 303 (44 Vt. 116); *Sutton v. Town of Waurescott*, 9 id. 524 (39 Wis. 21).—RMR.

AUSTIN V. BRISTOL.

(40 Conn. 120.)

Will—bequest—vested interest—legacies to a class.

Testator bequeathed his property to his wife for life, and then as follows

"Upon the decease of my said wife, I give all my said estate to such of my children as may be living at the time of her decease, and to the issue of those who may have deceased." One of testator's children died in his life-time, leaving a child who died after the death of the testator, and before that of his widow. *Held*, that such child had a vested interest under the will, to which his administrator was entitled after the death of the widow.

The will contained the further provision: "If none of my children or their issue shall be living at the time of my wife's decease, I then give all my estate to W. *Held*, that the effect of the provision was to divest the interest upon the contingency happening, and that it did not operate to prevent its vesting.

SUBMISSION upon an agreed statement for the construction of a will. The opinion sufficiently states the case.

G. Pratt, for plaintiff.

J. S. Beach and *L. H. Bristol*, for defendant. The question with regard to the real estate left by the testator having been disposed of by a former decision of this court (38 Conn. 405), the only question for our present consideration is, whether, under the will, the grandchild Louisa took such an interest in Mr. Hughes' personal property, that it vested in her during her life, and upon her decease passed to her personal representative.

First. This question is answered in the negative by the plain language of the testator's will, disposing of his estate, upon the decease of his wife, as follows: "Upon the decease of my said wife I give all my said estate to such of my children as may be living at the time of her decease, and to the issue of those who may have deceased." By these words, considered by themselves alone, without extrinsic aid from the other provisions of the will to be hereafter considered, it is clear that the testator intended to designate as the objects of his bounty those children and their representatives, and those only, who should be in existence at the date of his wife's decease.

1. Admitting the preference which the law has for vested over contingent interests, and admitting also that upon an ordinary limitation, by way of remainder, to children in a class, all those who are *in esse* at the decease of the testator take vested and consequently transmissible interests, it is also elementary law that where it appears from express declaration or clear inference that the testator intended to confine his bequest to those only who answer the description at the happening of a certain contingency, such intention must be carried into effect. 1 Jarman on Wills, 816, 817; 2 Redfield on Wills, 623. In the first place, it is clear that the bequest, upon the decease of Mrs. Hughes, "to such of my children as may be living at the time of her decease," gave *them* only a contingent, and not a vested interest in the estate. *Wordsworth v. Wood*, 2 Beavan, 25; *Olney v. Hull*, 21 Pick. 311; *Thomson v. Ludington*, 104 Mass. 193; *Hurlburt v. Emerson*, 16 id. 241; *Winslow v. Goodwin*, 7 Metc. 363; *Denny v. Allen*, 1 Pick. 147; *Baldwin v. Karver*, Cowp. 309. The foregoing authorities making it plain

that the bequest to the children is contingent upon their survivorship of their mother, it would seem to be a matter of "clear inference," that the bequest to the issue (in this case the grandchild) is also contingent upon the same survivorship.

2. It may be claimed that the bequest to the issue of a deceased child is not contingent, but vested, because it is given to that issue without being *in terms* restricted to such issue as shall be living at Mrs. Hughes' death. To this claim, there are several sufficient answers. In the first place the contingency, that is, the death of Mrs. Hughes, attaches to the substance of the gift, and not merely to the time of payment. By the words "*upon* the death of my wife I give," the benefit in point of right is limited by the testator to those who are then in existence to answer to the description of those who are to take. If no issue of a deceased child is then in being, there is no one to fall within the category created by the words. The case comes within the rule that when the words "payable," or "to be paid," are omitted, and a legacy is given "at twenty-one," or as in this case, at the death of the widow, this confers only a contingent interest. *Cruss v. Barley*, 3 P. Wms. 20; *Smell v. Doe*, 2 Salk. 415; *Bruse v. Charlton*, 13 Sim. 65, 68; *Phelps v. Phelps*, 28 Barb. 121. In the next place the construction contended for involves the absurdity of supposing that the testator had in his mind a preference for his remoter descendants (unknown and unborn) over his own immediate children, and that he intended by the language used to give his children only an inchoate, contingent, untransmissible interest, but did intend to give his grandchildren, in case of a parent's death, an interest that would be absolute, vested and transmissible, so that the share which, during the life-time of the mother, was only contingent, should, on the instant of her decease, become absolute and perfect in the daughter. This construction, in a not improbable contingency, might result in a grandchild's taking the whole estate, while in the same contingency an own daughter of the testator would be entitled to but one-half of it. Again, the testator's object in the use of the language under consideration cannot be questioned. No one can doubt that his manifest intention was to provide for those of his children who should survive his wife, with a further provision that the issue of a deceased child should be substituted in place of the deceased parent, so as to take that parent's share and no more. This view is sustained by the weight of English authority in sim-

ilar cases. *McGregor v. McGregor*, 2 Coll. C. C. 192; *Bennett v. Merriam*, 6 Beavan, 360; *In re Corrie's will*, 32 id. 426; *Holgate v Jennings*, 34 id. 79. It may be conceded that some of the English cases come to a different conclusion; but an examination of those authorities will show that they turned upon the construction of a particular clause, upon which no light was shed by the other provisions of the will, and that the *conceded intent* of the testator is *sacrificed* to the strict and literal import of the *words* used. It is respectfully submitted that in a conflict of authority an American court will follow those decisions which, discarding technical construction, make the testator's intention the cardinal principle of interpretation. See remarks of the court in *White v. Howard*, 38 Conn. 355.

Second. It is submitted that we have showed that the language of the bequest upon the decease of the wife, considered by itself, is sufficient to demonstrate a positive intent that the contingency of survivorship was to apply as well to the remote descendants, the issue, as to the immediate offspring, the children. An examination of the other and subsequent provisions of the will puts it beyond the possibility of doubt that the testator intended that the issue of a deceased child should take a share in his estate, *only* in case such issue should be alive at the date of his wife's decease.

1. No citation of authorities is needed to show that, in this country, the construction of a will is to be made upon the *entire* instrument, and consequently all its parts are to be considered with reference to each other. As remarked by the court in *Hoxie v. Hoxie*, 7 Paige, 192, "the testator's intention is to be ascertained from every thing contained within the four corners of the instrument." "The legal import of technical language is not to prevail against the manifest intention of the testator, appearing from other parts of the will." *Homer v. Shelton*, 2 Metc. 194. "Whatever may be the strict grammatical construction of the words, that is not to govern if the intent of the testator unavoidably requires a different construction." *Smith v. Bell*, 6 Peters, 68, 84.

2. The intent of the testator in this case, as gathered from the subsequent provisions of the will, restricts the gift to such issue as should survive the wife. In the first place, the language of the gift in question is followed by directions having in view certain contingencies which might happen during the continuance of the wife's life, and which form no essential part of the disposition. c.

Austin v. Bristol.

the *corpus* of the estate. Then follows the clause, "If none of my children, or *their lawful issue*, shall be living at the time of the decease of my said wife, I give, devise and bequeath all my said estate to William L. Wight, and Grace, his wife." No refinement of ingenuity can reconcile this language with an intent to vest an interest in the issue irrespective of their survivorship of the wife. Place in juxtaposition the two clauses, and the meaning is unmistakable. "Upon the decease of my wife I give my estate to such of my children as shall be living at the time of her decease, and to the issue of any deceased child, but if no child and no issue of any child shall be living at her decease, then over." Language could not, it would seem, more clearly express the idea that neither child, *nor the issue of any child*, was to take unless they survived the wife. In the next place, the provision in the will that, upon the contracting of a second marriage by the wife, "two-thirds of the estate shall thereupon immediately vest in my children then living, and in the issue of those who may have deceased," is of itself a conclusive indication that the testator did not intend that any interest should vest in the issue before the marriage or death of the widow. Suppose Mrs. Hughes had married again in 1869; if the interest of the grandchild was already vested, as contended by the plaintiff, why provide that it should vest *then*? There cannot be two periods of vesting. The established rule in such cases is, that a provision that devisees shall take a vested interest upon the happening of a certain event, raises a sufficient implication against their taking a *present* vested interest. *Glanville v. Glanville*, 2 Mer. 38; *Comport v. Austen*, 12 Simons, 218, 246; *Wakefield v. Dyatt*, 4 Jur. (N. S.) 1098. Further, the gift of the whole estate to the wife for her life "to be used in the support of herself and my children," taken in connection with the power given to the wife "to sell and dispose of any part of my said estate, absolutely and in fee simple," is fatally repugnant to the idea that any interest under the will was to become vested until the death of the wife. And finally, the supposed intent to vest an absolute, indefeasible, transmissible interest in the grandchild, is at variance with the whole scheme of the will, and the painstaking care therein shown to restrict the enjoyment of the testator's estate to those only of his own blood, so long as any such were in existence. It will be seen that the estate is first limited to his own children and their issue; then, if any of them die without issue, to the sur-

vivors; then, in case of the death of the last survivor without issue, to his only sister, Mrs. Wight, and her husband, and the survivor of them; and, upon the death of the survivor, to their issue. That a testator should take such special precautions to give his own blood the benefit of his estate so long as that blood continued to exist, is clearly inconsistent with an intention to vest in a grandchild an absolute estate which might, and in the event that has happened would, upon her decease, pass out of his family to a mere stranger having no claim upon his bounty.

Third. To give effect to the manifest intention of the testator, the court will if necessary transpose the words of the bequest, so as to read "to such of my children, and to the issue of those who may have deceased, as may be living at the time of her decease." *Covenhoven v. Shuler*, 2 Paige, 122; *Pond v. Bergh*, 10 id. 140; *East v. Cook*, 2 Vesey Sen. 32; *Blamire v. Geldart*, 16 id. 316; *Mosley v. Massey*, 8 East, 149; *Doe v. Allcock*, 1 B. & Ald. 137; *Kellogg v. Miz*, 37 Conn. 243.

SEYMOUR, J. The question in this case arises upon the construction of the following clause in Mr. Hughes' will :

"Upon the decease of my said wife I give all my said estate to such of my children as may be living at the time of her decease, and to the issue of those who may have deceased, and to their heirs and assigns forever; to be equally divided between them; the issue of such deceased children to take *per stirpes* and not *per capita*."

The will is dated in 1841, at which time all Mr. Hughes' children, five in number, were living. He died in 1864, leaving a widow to whom all his property was given for her life, and leaving four of his children (who ultimately survived the widow), and leaving one grandchild, Louisa Hughes Austin, the daughter and only child of his daughter Louisa, who had died prior to his death. This grandchild died February 18, 1870, a minor and intestate, having her domicile in New Haven. The widow died in 1872.

The administrator of the grandchild, as plaintiff in this amicable suit, claims under the will one-fifth part of the personal estate of Mr. Hughes. The claim is that upon the death of Mr. Hughes the grandchild took a vested interest in one-fifth part of his estate, subject indeed to be divested in a certain event provided for in another part of the will, to be more particularly noticed hereafter ;

which interest might also be increased in the event of the death without issue of one or more of her uncles or aunts.

The defendant on the other hand insists that the gift to the testator's children is clearly contingent upon their surviving their mother, the gift being only to such of them as may be living at her death; and that a similar contingency by reasonable construction applies to the grandchild, to wit, that in order to take under the will she must be living at the death of her grandmother; and that the clause above recited in the will should be construed as it would be had the words "if then living" been inserted after the word "issue."

It is conceded to be probable that had the testator's attention been called to the subject he would have made the gift to the grandchild dependent upon the same contingency of being alive at the termination of the life estate on which the gift to his children is made to depend; and this probability has been deemed so strong that in the earlier cases the issue under wills like this were adjudged not to take unless living at the death of the tenant for life. But clauses like that under consideration frequently occur in wills and have become the subjects of much discussion. The earlier cases have been in the English courts carefully reviewed, and it is now firmly settled in England that under the language used in this will the grandchild takes a vested estate.

It is true that, in regard to the construction of wills, former cases, unless *ad idem*, are of small account; but in respect to clauses of frequent occurrence in wills it is important that there should be uniformity of construction; and we do not feel at liberty to adopt a rule as applicable to this case different from that which has received the sanction of the highest courts in Great Britain, unless we can see strong reasons for such departure.

It is clear upon well-settled rules of construction that the words of this will in their natural import create a vested interest in the grandchild immediately on her grandfather's death. At his death she was the issue and sole issue of one of his children who had deceased. As such, she was to take *per stirpes*, that is, to take the share which her mother would have taken had she lived till the death of the tenant for life, namely, one-fifth of the estate. No contingency is expressed in the will regarding this gift. The object of the testator's bounty is alive at the testator's death and capable of immediately taking. There is no uncertainty

as to the person, or as to the gift. The time of taking possession is indeed postponed till the grandmother's death, but the words of the gift are in the present tense, "I give." The words connected with these words of gift, to wit, "upon the decease of my said wife," are uniformly construed both in England and in this country to relate to the time of taking effect in possession and not to the time of taking effect in interest. *Harvey v. McLaughlin*, 1 Price (Exch.) 254; *Throop v. Williams*, 5 Conn. 98; *Fay v. Rogers*, 2 Gray, 175; *Harrison v. Foreman*, 5 Vesey, 209.

The whole question then resolves itself into this, whether the fact that the testator's children take only a contingent estate, depending on their outliving their mother, clearly indicates that the gift to the issue of such of his children as might die during the mother's life, is by implication also contingent upon the like event of their being alive at the death of the tenant for life.

Conflicting views and decisions have taken place in England on this subject, and refined distinctions have been attempted. They are readily found in our text-books, and there is no occasion to examine the controversy in detail. The late case of *Martin v. Hologate*, in the House of Lords, seems to have settled the question in England, Law Rep., 1 House of Lords Cas. 175. The bequest in that case, in every essential feature which affects the matter before us, is identical with the bequests in Mr. Hughes' will. The testator bequeathed his residuary estate to his wife for life, and then to such of his nephews and nieces as should be living at her death and then adds, "but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's share, but in equal proportions." A nephew died during the life of the widow, leaving a daughter who died an infant during the widow's life. The same question there arose which arises here, namely, whether this infant daughter took a vested interest in the residuary estate, and it was held that she did. Several eminent judges gave opinions at length, all concurring in the judgment. The grounds of the decision are very clearly stated by Ex-Chancellor Lord WESTBURY. He says: "According to the plain effect and meaning of this bequest, unless that meaning be altered by the implication of additional words, the issue living at the death of a nephew or niece who may pre-decease the tenant for life, take an immediate vested interest in that share which would have been taken by the parent if he or she had been living at the time of distribution.

Austin v. Bristol.

The interest of the issue is vested and immediate, although the amount of the share is uncertain until the death of the tenant for life."

We give another extract from Lord WESTBURY's opinion. "The implication contended by the respondent is not warranted by the form of the gift which is not elliptical, nor referential, nor substitutional; nor is the implication necessary to avoid absurd or contradictory consequences. It is by no means irrational to suppose that the testator intended to make the interest of the orphan issue vested and immediate, although he made the interest of the parent contingent on surviving the tenant for life. A judge is not justified in departing from the plain meaning of words which admit of a rational construction, for the purpose of giving effect to an assumed intention which appears to him more rational or more consistent with the rest of the will."

In *Martin v. Holgate* the bequest to the issue of deceased nephews and nieces is indeed in a sentence distinct from that in which the gift is made to the nephews and nieces themselves; so far differing from the case under our consideration, where the contingent gift to the testator's children and the gift to the issue of deceased children are in different clauses of the sentence. So, too, there is a slight difference of phraseology in the two wills, the contingency, "if any or either of them should then be dead leaving issue," being expressed in the will before the House of Lords and not expressed in Mr. Hughes' will.

In the case *In re Orton's trust*, reported in Law Rep., 3 Eq. Cas. 374, the form of the gift is more closely like that in the case before us. The entire gift to children and the issue of deceased children is in one and the same sentence, and the phraseology of the two wills nearly identical. In *Orton's trust*, the money to be raised by the sale of property on the death of the testator's two sons was thus bequeathed: "equally among such of my five daughters as shall be living at the death of the survivor of my sons, and to the children, grandchildren and issue of such of my said daughters as shall then happen to be dead," etc.

The case was regarded by the court as clearly falling within the rule established by *Martin v. Holgate*, and the doctrine of that case was carried to an extent which we have no occasion here to follow.

These two English cases seem to settle the law in England so

fully that we forbear the citation of the numerous conflicting cases which preceded them. Several American cases were cited by counsel, but none of them seem to touch the precise point on which this turns.

The counsel for the respondent rely upon another part of the will as having an important bearing on the question under consideration. A clause occurs in Mr. Hughes' will in substance as follows: "If none of my children or their lawful issue shall be living at the time of the decease of my said wife, I then give all my estate to William L. Wight," etc. The effect of this clause is such that, upon the contingency therein expressed happening, Louisa Hughes Austin and her representatives would lose their interest in the estate of Mr. Hughes. The interest vested in her, and on her death in her representatives, would be divested upon the happening of the contingency, and this we apprehend is the whole and only effect of the clause. The clause is entirely consistent with an interest vested, but subject to be divested by the contingency provided for. It is a familiar rule that if there are clear words of gift giving a vested interest to parties, the court will not permit that absolute gift to be defeated unless it is perfectly clear that the very case has happened in which it is declared that the interest shall not arise. The rule is thus stated in *Harrison v. Foreman*, 5 Ves. 209. The Master of the Rolls there says: "There is a vested interest, and the contingency upon which it is to be divested has never happened. The vested interest, therefore, remains as if that contingency had never been annexed to it."

In conclusion, then, it appears that the weight of authority is in favor of the plaintiff's claim, and we also yield, though with some hesitation, to the force of reasons by which that claim is supported. We, therefore, advise the Superior Court that the plaintiff, as administrator of Louisa Hughes Austin, is entitled to a share of the personal estate of the deceased Enos B. M. Hughes.

In this opinion the other judges concurred.

 Baldwin v. The Greenwoods Turnpike Co.

BALDWIN V. THE GREENWOODS TURNPIKE COMPANY.

(40 Conn. 222.)

Highway — defect in — negligence.

Plaintiff's horse, while being driven on a highway with due care, became frightened without plaintiff's fault and ran off the highway, across private property, on to defendant's turnpike, where he was injured by falling over a defective bridge, which defendant was bound to repair. *Held*, that defendant was liable.*

ACTION on the case for an injury sustained from a defective bridge belonging to defendant. The opinion states the case.

G. C. Woodruff and *Andrews*, in support of motion. 1. The rule is that a plaintiff seeking to recover for an injury arising from a defective highway or bridge must show that he exercised due care to avoid it. This exercise of due care the plaintiff must show affirmatively and as a part of his case. To state the rule conversely — the liability of a town or corporation for an injury arising from a defective highway or bridge only begins at the point where due care ceases to be a protection from injury by reason of such defect. If it should appear that the exercise of this due care would have avoided the injury, then the plaintiff cannot recover because, as it is usually stated, the plaintiff, in such a case, "contributes to his own injury." *Birge v. Gardner*, 19 Conn. 507; *Weeks v. Conn. & R. Island Turnpike Co.*, 20 id. 134; *Neal v. Gillett*, 23 id. 437, 444; *Fox v. Town of Glastonbury*, 29 id. 204; Angell on Highways, § 345; 1 Hilliard on Torts, ch. 4, § 5.

2. This rule requires that care be exercised at the very time when, and place where, the injury happens. 1 Hilliard on Torts, ch. 4, § 2; *Calkins v. City of Hartford*, 33 Conn. 57; *Thorp v. Town of Brookfield*, 36 id. 320; *Bronson v. Town of Southbury*, 37 id. 199; *Congdon v. City of Norwich*, id. 414; *Landolt v. City of Norwich*, id. 615; *Hyde v. Jamaica*, 27 Vt. 443; *Palmer v. Andover*, 2 Cush. 600; *Davis v. Dudley*, 4 Allen, 557; *Blodgett v. City of Boston*, 8 id. 237; *Titus v. Northbridge*, 97 Mass. 258;

* See also *House v. Town of Fulton* (29 Wis. 236), 9 Am. Rep. 142.

 Baldwin v. The Greenwoods Turnpike Co.

Moore v. Abbott, 32 Me. 46; *Farrar v. Greene*, id. 574; *Moulton v. Sanford*, 51 id. 127.

3. The charge finds no support in those cases which decide that a plaintiff may recover even though an accident contribute to the injury. All those cases require that due care be exercised at the very time of the injury. *Hunt v. Pownal*, 9 Vt. 411; *Clark v. Barrington*, 41 N. H. 44; *Winship v. Enfield*, 42 id. 197; *Shearm. & Redf. on Negligence*, § 416.

4. The charge given, that the accident happening outside the limits of the defendants' road did not prevent the plaintiff's right of recovery, was wrong. It is found that the defendants were not responsible for the town road. *Rowell v. City of Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, id. 104; *Richards v. Enfield*, 13 id. 344.

Graves and E. W. Seymour, contra, cited *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henricker*, id. 317; *Winship v. Enfield*, 42 id. 197; *Hunt v. Pownal*, 9 Vt. 411; *Kelsey v. Glover*, 15 id. 708; *Palmer v. Andover*, 2 Cush. 600; *Manderschid v. Dubuque*, (29 Iowa 73), 4 Am. Rep. 196; *Angell on Highways*, §§ 295, 299; *Shearm. & Redf. on Negligence*, §§ 416 and note, 417.

MINOR, J.* A servant of the plaintiff was driving his horse before a carriage on a public highway in the town of Norfolk over which the defendants had no control, and which was then without defect. While so driving, from some secret defect, and without fault on the part of the plaintiff or his servant, the iron band attaching the end of one of the shafts to the axle broke, and the shaft, with the cross bar, fell upon the horse's heels. The horse, very much excited and frightened, at once commenced to run, and in a short time the servant, in efforts to restrain him, was thrown from the carriage; after which the horse, with great speed and without control, ran from the public highway upon private property outside of the limits of any highway, and from thence upon the defendants' turnpike, passing on to the turnpike at a point about thirty feet distant from one of the defendants' bridges, which they were bound to keep in repair. The horse, still excited and without control, continued his course on the turnpike and on to

*Judge MINOR, of the Superior Court, sat in the case in the place of Chief Justice SEYMOUR, who, having been consulted in the case when at the bar, did not sit.

Baldwin v. The Greenwoods Turnpike Co.

the bridge, and having passed about twenty feet thereon, was injured by reason of falling from the side of the same on account of a defect in the railing, which the defendants had carelessly and negligently failed to keep in proper repair.

The plaintiff's servant was thrown from the carriage, while on the public highway, and at a place about eighty rods distant from the turnpike.

There is nothing in the case showing that the horse was vicious or unfitted to encounter the risks of ordinary public travel, nor that the plaintiff or his servant was negligent in not knowing of the secret defect in the carriage, nor that there was any negligence or want of reasonable care on the part of either, which at all contributed to the injury. But it does appear that the defendants' negligence in not keeping the railing of their bridge in proper repair, combined with an accident for which neither party was responsible, was the cause of the injury.

Under these circumstances, who ought to sustain the loss, the plaintiff or the defendants?

The defendants did not seriously urge the secret defect as absolving them from liability, and, as we think, very properly; for a traveler cannot be regarded as an insurer of the strength of his carriage and harness at all times and under all circumstances. The most that can be required of him is, that he exercise ordinary care and prudence with reference to them in their purchase and use, and in the attention necessarily to be given to them in order that he may pass safely over highways and bridges not in a defective condition. In this regard it appears that the plaintiff performed his entire duty.

While essentially admitting this, the defendants claim that the plaintiff, seeking to recover damages for the injury, must show that he exercised due care to avoid it at the *very time when*, and the *place where*, the injury happened; and they deny his right to recover in this case because by accident he was, *then and there*, prevented from exercising any care, and consequently contributed to his own injury.

This claim brings into consideration the question, whether the defendants are relieved from liability for an injury caused by their negligence, combined with an accident for which no responsibility attaches to either party.

The plaintiff performed no negligent act, nor can we see that he failed to do any thing by the performance of which the injury might have been avoided; he was providentially prevented from acting. This falls far short of that contributory negligence which excuses the defendants.

We may conjecture that if the servant had remained with his horse and continued in control of him, the injury might have been avoided.

The failure of a traveler to be continually present with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and only negligence with reference to the matter.

In our judgment the proper rule is this:—If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable.

Nor will the fact that the horse of the plaintiff was uncontrolled for some distance before the injury change or in any way affect the liability of the defendants.

The statute laws of our State impose upon towns and corporations the duty to keep their highways and bridges with sufficient railings in suitable repair. This is a positive duty, and the safety of the traveling community requires that it should be rigidly enforced. When they have been almost criminally remiss in the performance of this duty, and injuries happen from the insufficiency of their bridges or highways, they ought not to escape the consequences of such injuries unless upon the plainest principles of law. While we agree that the defendants were not bound to provide such railings for their bridges as would restrain all uncontrolled or unmanageable animals passing over the same, we yet hold them to their duty with reference to sufficient repairs and to their liability for injuries occasioned by want of the same.

The questions arising in this case have been before the courts of some of our sister States, and the weight of authority seems to be in favor of the result to which we have come.

Hale v. Sherwood.

In Maine it has been holden that a town or corporation is not liable under circumstances similar to those of the present case.

In Massachusetts there have been decisions somewhat conflicting, but the law seems now to be settled that the defendants are holden, except when the team becomes unmanageable outside of the limits of their highway, or from fright at some object which is not a defect in the same.

In Vermont the adjudications lead logically to the conclusions to which we have come. In *Hunt v. Pownal*, 9 Vt. 411, the learned Judge REDFIELD, in giving the opinion, says:—“In every case of damage occurring on the highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young or active, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is to guard against these constantly recurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could always be sure of this he would not require any further guaranty of his safety unless the road were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road conspiring with some accidental cause, the defendants are liable.”

The charge of the judge in the court below was substantially in accordance with these views. A new trial is therefore not advised.

In this opinion the other judges concurred.

HALE V. SHERWOOD.

(40 Conn. 382.)

Betting and gaming — recovery of stake — demand.

Plaintiff and another deposited money with defendant as stakeholder upon an unlawful wager. Plaintiff, claiming to have won, demanded the entire deposit of defendant; but defendant refused to comply with the demand, and paid the money to the other party. In an action by plaintiff to recover the amount deposited by him, *held* (PARK, J., dissenting), that plaintiff's right was not defeated by the fact that his demand covered the whole amount of the stake, and was made in affirmance of the wager.

ASSUMPSIT for money received by defendant to the plaintiff's use. Plea, that defendant had held the money as a stakeholder upon a wager on a race between plaintiff's horse and the horse of one Howe; that both parties claiming to have won, it was submitted to an arbitrator, who awarded in favor of Howe; and that thereupon defendant paid over the money to Howe, before plaintiff had repented or sought to escape from his bet, or had given notice or made demand for the money. Each party to the wager had deposited with defendant the sum of \$250, and it was for this sum that plaintiff brought suit. The evidence showed that the winning of the wager was in dispute — both parties claiming it; that plaintiff had demanded the whole \$500 of defendant on several occasions, but had never demanded the amount of his deposit, nor given notice that he repented of his bet or rescinded the wager. The defendant paid the \$500 to Howe before suit was brought.

The court charged, on the question of notice, as follows:

1. That an actual payment by the stakeholder is valid, if made to the winner before notice.

2. That a notice not to pay operates as a countermand of the authority implied by the original deposit, and renders a subsequent payment wrongful as against the party by whom the notice is given. That the position of the stakeholder is that of agent or bailee, who will be liable generally if he attempts to carry out a transaction which is void as a contract and has been revoked as an authority.

3. That if demand is made by a depositor of the stakes as a winner, and of all the stakes, with no repudiation or revocation of the stakeholder's authority as a stakeholder, he has no remedy, if payment is made to the other party in good faith by the stakeholder. That if a party to a wager all the while assumes that the wager is still a wager, and confirms the authority of the stakeholder, and merely claims that he has won and is entitled to the stakes as a winner, that is not a revocation in law. But if, in addition to demanding all the money, the depositor or wagerer expressly forbids the payment to the other party of the money, and threatens to sue the stakeholder if he pays the other party, and the payment is made after he is so forbidden and threatened, the stakeholder is liable, unless from other facts the jury find the revocation of authority waived or repudiated, and consent to pay over given.

The jury having returned a verdict for the plaintiff, the defendant moved for a new trial for error in the charge of the court and in the refusal to charge as requested.

Hale v. Sherwood.

Sanford, in support of motion, cited *Good v. Elliott*, 3 T. R. 693; *Bunn v. Riker*, 4 Johns. 426; *Yates v. Foot*, 12 id. 1; *Morgan v. Groff*, 5 Denio, 364; *Like v. Thompson*, 9 Barb. 315.

G. Stoddard and Hall, contra, cited *Wheeler v. Spencer*, 15 Conn. 28; *Hastelow v. Jackson*, 8 Barn. & Cress. 221; 2 Smith's Lead. Cas. (H. & W. ed.) 345.

FOSTER, J. The courts of this State have very seldom been called on to enforce claims of parties directly or remotely connected with wagering contracts. Such contracts are considered contrary to the principles of morality and against sound policy. Perhaps the only case to be found in our reports on this subject is that of *Wheeler v. Spencer*, 15 Conn. 28. There, as here, the plaintiff sought to recover from the defendant an amount of money deposited with him as a stakeholder. Judge HINMAN, who gave the opinion of the court, after considering the questions involved, came to the following conclusion (p. 32): "The doctrine to be extracted from all the cases is this: that money received by a third person, not a party to an illegal transaction, may be recovered back before it is paid over, as money had and received to the plaintiff's use; and that where an illegal wager has been laid, either party may notify the stakeholder not to pay it over to the winner, and recover back the amount of his stake, and it is wholly immaterial whether the event upon which the money was staked has or has not happened, when the party chooses to recall it."

In the present case each party claimed that he had won the wager, a bet on a horse race, and each party claimed that the stakeholder should pay over to him the full amount deposited in his hands. The plaintiff made such demand of the stakeholder, and forbade his paying over the money to the other party, while he still retained it in possession. Previously to bringing the suit the defendant had paid over the money to the other claimant, taking from him a bond of indemnity.

The instruction given by the court below as to the law on these facts we think was correct. The point here insisted on by the defendant is, that though the plaintiff forbade the defendant from paying over the money, and avowed his purpose to bring a suit to recover it should such payment be made, still he demanded of the defendant the payment of the whole sum deposited with him. This precise question, it is true, did not arise in the case of *Wheeler v.*

Spencer but the principle recognized in that case, we think, decides it. Forbidding the stakeholder to pay over the money, while it was still in his hands, terminated and revoked his previous authority to do so. That the plaintiff demanded a greater sum than he had deposited, we think is not a reason why he should not be entitled to the sum he actually did deposit. In the case of *Hastelow v. Jackson*, 8 Barn. & Cress. 221 (15 E. C. L. 204), BAYLEY, J., says: "It has been urged that the money had been paid over before the action was brought, and the plaintiff had done no act to rescind the wager, nor had even intimated that he claimed his own money, and that only. But if a stakeholder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril.

* * * And the defendant, having paid over the whole, after the plaintiff's prohibition, which was valid as to a moiety of the stakes, paid over that moiety wrongfully, and is liable to refund it to the present plaintiff." This case is quoted as an authority by this court in the case of *Wheeler v. Spencer*.

Some other questions appear upon this record, but they are rather questions of fact than of law. We perceive no question of law, on which the court was requested to charge, where the charge was erroneous. As the matter stands, each party will have the money originally deposited by him in the hands of the stakeholder, less the amount of fees and expenses to which he has been subjected. Should betting, and all other forms of gambling, always prove unprofitable, as they are always immoral, it would be no cause of regret.

A new trial is not advised.

In this opinion the other judges concurred, except PARK, J., who dissented.

CURRIER v. LOCKWOOD.

(40 Conn. 248.)

Bills and notes — what constitutes a promissory note — due bill.

A writing in these words, "Due C. D. seventeen dollars value received, A. B.," held (FOSTER and PHELPS, JJ., dissenting), not to be a "promissory note not negotiable," within the statute limiting the time of suing on such instruments

Currier v. Lockwood.

ASSUMPSIT upon a written instrument described as a note. Plea, the statute of limitation. The opinion states the case. The defendant had a judgment and plaintiff moved for a new trial.

Thompson, in support of motion. 1. There is no variance. The writing imports a "promise to pay" and it is set forth according to its legal effect. *Smith v. Allen*, 5 Day, 337; *Edwards on Bills*, 131; 1 Am. Lead. Cas. (5th ed.) 383. The acknowledgment of indebtedness implies a promise to pay, and constitutes it a promissory note. *Cummings v. Freeman*, 2 Humph. 143; *Marrigan v. Page*, 4 id. 247; *Fleming v. Burge*, 6 Ala. 373; *Brenzer v. Wightman*, 7 Watts & Serg. 264; *Brewer v. Brewer*, 6 Ga. 588; *Lowe v. Murphy*, 9 id. 341; *Johnson v. Johnson*, Minor (Ala.), 263; *Harrow v. Dugan*, 6 Dana, 341; *Kilgore v. Bulkley*, 11 Conn. 383. If the instrument is a "note not negotiable," it is not barred by the statute of limitations, such notes running seventeen years.

2. But if within the statute which limits it to six years, yet it is taken out of the statute by the acknowledgments of the debt made by the defendant within six years preceding the bringing of the suit. He admitted that it was justly due when he said, "I will give you a ton of coal for it." He afterward went to settle it, asked for the note, and not until directed to settle with the agent did he say that it was outlawed, and even in declaring it to be outlawed he does not say that he shall refuse to pay it on that account. *Lord v. Harvey*, 3 Conn. 372; *DeForest v. Hunt*, 8 id. 184; *Austin v. Bostwick*, 9 id. 501; *Lee v. Wyse*, 35 id. 384.

Lockwood, contra. 1. A note must contain a legal promise for the certain payment of a certain sum. 1 *Parsons on Notes & Bills*, 23, 24; *Story on Prom. Notes*, § 14; *Bouvier's Law Dict.*, *Due Bill*, *Promissory Note*, and *I. O. U.* An acknowledgment of a debt is not a promissory note. 1 *Parsons on Notes & Bills*, 25; *Byles on Bills*, 11, 28; *Smith v. Allen*, 5 Day, 340; *Beeching v. Westbrook*, 8 Mees. & Wels. 412; *Melanotte v. Teasdale*, 13 id. 216; *Bowles v. Lambert*, 54 Ill. 237. The note must contain and must express the promise of the debtor to pay the money. 1 *Parsons on Notes & Bills*, 25.

2. The statute of limitations applies. Our courts have never adopted the expedient, which has prevailed to some extent in other States, of taking cases out of the statute upon some doubtful or equivocal acknowledgment, but have always held that the party

Currier v. Lockwood.

must have intended to relinquish its protection, or that its provisions must be applied. *Hart's Appeal from Probate*, 32 Conn. 539. An admission that the note was unpaid, accompanied by a claim that it was "outlawed," is not sufficient to remove the bar of the statute. *Sanford v. Clark*, 29 Conn. 460. An offer to pay a certain sum in satisfaction of a larger one will not remove the bar of the statute, even as it regards the sum actually offered, unless the offer is accepted when made. *Bell v. Morrison*, 1 Peters, 351; *Smith v. Eastman*, 3 Cush. 355; *Mumford v. Freeman*, 8 Metc. 432; *Brush v. Barnard*, 8 Johns. 407; *McLellan v. Albee*, 5 Shepley, 184; 1 Smith's Lead. Cas. (H. & W. Notes), part 2d, p. 876.

SEYMOUR, C. J. The first question in this case is whether the writing sued upon is a promissory note within the meaning of those words in the statute of limitations. The statute is as follows: "No action shall be brought on any bond or writing obligatory, contract under seal, or promissory note not negotiable, but within seventeen years next after an action shall accrue." The instrument sued upon is as follows:

.. BRIDGEPORT, *January 22d*, 1863.

"\$17.14. Due Currier & Barker seventeen dollars and fourteen cents, value received.
FREDERICK LOCKWOOD."

Promissory notes not negotiable are by the statute above recited put upon the footing of specialties in regard to the period of limitation, and for most other purposes such notes have been regarded as specialties in Connecticut. The instrument, however, to which this distinction has been attached is the simple express promise to pay money in the stereotyped form familiar to all. The writing given in evidence in this case is a due bill and nothing more. Such acknowledgments of debt are common and pass under the name of due bills. They are informal memoranda, sometimes here as in England in the form "I. O. U." They are not the promissory notes which are classed with specialties in the statute of limitations. The law implies indeed a promise to pay from such acknowledgments, but the promise is simply implied and not express. It is well said by SMITH, J., in *Smith v. Allen*, 5 Day, 337, "Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in legal construction import an express promise to pay; but where a writing imports not only

Currier v. Lockwood.

the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract."

In that case the words "on demand" were held to import and to be an express promise to pay. That case adopts the correct principle, namely, that to constitute a promissory note there must be an express as contra-distinguished from an implied promise. The words "on demand" are here wanting. The words "value received," which are in the writing signed by the defendant, cannot be regarded as equivalent to the words "on demand." The case of *Smith v. Allen* went to the extreme limit in holding the writing there given to be a promissory note, and we do not feel at liberty to go further in that direction than the court then went.

The writing then not being a promissory note, the plaintiff's action is barred by the six years clause of the statute, unless revived by a new promise to pay.

The offer of the defendant to give a ton of coal for the note was not accepted. It was a mere offer of compromise, and clearly no acknowledgment to take the case out of the statute.

The other conversation between the parties, recited in the motion, taken together as one transaction, was held by the Court of Common Pleas not to be sufficient evidence of a new promise. The result of the interview was a refusal to pay. The opening of the conversation on the part of the defendant would seem to admit the justice of the plaintiff's demand. The expression of a wish "to settle the note" would seem to imply that it was justly due; but the word "settle" is somewhat equivocal, and taking the whole interview together, we think the Court of Common Pleas made no mistake in law in deciding as it did.

A new trial is not advised.

In this opinion PARK and CARPENTER, JJ., concurred.

FOSTER, J., delivered a dissenting opinion (with which PHELPS, J., concurred), which we give in the note.

FOSTER, J. That the paper before us is more correctly described as a due bill than as a promissory note is unquestionable. That it would be regarded among business men, in the daily transactions of life, as conferring the same rights, and imposing the same liabilities, as a promissory note, seems to me equally unquestionable. It was so regarded by the parties to it; it was so treated and so spoken of whenever it was alluded to. This is manifest from

the record; "The defendant came into the store of said Barker (one of the plaintiffs), and said to him, 'Have you that note?' or, 'Where is that note' and that he 'wished to settle it.' Barker told him 'the note was in Mr. Stevens' hands, etc.'" Any writing importing a debt, and an obligation to pay it, especially if it contains the words "for value received," is, in the popular judgment, a note. This instrument is clearly of that character. It was clearly the intent of the parties so to make it, and it is evident that they supposed they had so made it. To hold otherwise would seem to be contrary to the understanding and intent of the parties.

But it is claimed that this instrument is not, in law, a promissory note, and that the legislature, in passing the statutes of limitation, could never have intended to put such contracts on a footing with specialties.

Now if we examine the various works on bills of exchange and promissory notes, we do not find that the learned authors of those treatises agree upon any exact and precise definition of a promissory note. Chitty, Bayley, Byles, Story and Parsons, however, all agree that no particular words are necessary to make a bill or note. "It is sufficient if a note amount to an absolute promise to pay money." Chitty on Bills, 428. Chancellor KENT, following substantially Mr. Justice BAYLEY, says, "A note is a written promise, by one person to another, for the payment of money, at a specified time, and at all events." 3 Com. 74. Judge PARSONS says, "A promissory note is, in its simplest form, only a written promise." 1 Parsons on Notes & Bills, 14.

These definitions imply that a note must contain an express promise to pay. And Mr. Justice STORY says: "But it seems that to constitute a good promissory note there must be an express promise upon the face of the instrument to pay the money; for a mere promise implied by law, founded upon an acknowledged indebtedment, will not be sufficient." Story on Prom. Notes, 14. Courts of the highest authority, however, both in England and in this country, hold otherwise; nor are all the text-writers so to be understood. "No precise words of contract are necessary in a promissory note, provided they amount, in legal effect, to a promise to pay." Byles on Bills, 8. "It is settled that a note need not contain the words 'promise to pay,' if there are other words of equivalent import." 1 Parsons on Notes & Bills, 24. What words are of "equivalent import," and are sufficient to raise a promise to pay, has occasioned much discussion. "The distinction between the cases on this point," says Mr. Justice STORY, in a note on the section above quoted, "is extremely nice, not to say sometimes very unsatisfactory." As long ago as 1795, Chief Justice EYRE, sitting at Nisi Prius, held an "I. O. U. eight guineas," to be merely an acknowledgment of a debt, and neither a promissory note, nor a receipt. *Fisher v. Leslie*, 1 Esp. 425. In 1800, in the case of *Guy v. Harris*, reported in Chitty on Bills, 526, Lord ELDON, whose authority is certainly not inferior to that of Chief Justice EYRE, held a similar paper to be a promissory note, and ruled it out when offered in evidence, because it had not a stamp. "I owe my father £470. Jas. Israel:"—This paper was offered in evidence before Lord ELLENBOROUGH, and he said: "I entertain some doubts whether this paper ought not to have been stamped as a promissory note, but on the authority of *Fisher v. Leslie*, 1 Esp. 425, I will receive it in evidence, though unstamped." *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnois*, Dow. & Ry. Nisi Prius Cases, 8, decided by Chief Justice ABBOT, is to the same effect. See also *Tompkins v. Ashby*, 6 Barn. & Cress. 541; 9 Dow. & Ry. 543; S. C. 1 Mees. & Wels. 32. If a time be named for payment, these instruments are differently construed. In *Brooks v. Elkins*, 2 Mees. & Wels. 74, "I. O. U. £20, to

Currier v. Lockwood.

be paid on the 22d inst.," was held to be either a promissory note, or an agreement for the payment of £10 and upwards, and in either case required a stamp. "I. O. U. £25, to be paid May 5th," was held to be a good promissory note. *Waithman v. Elsee*, 1 Car. & Kirw. 35.

The cases are numerous where an instrument has been held to be a good note without an express promise to pay. "I do acknowledge myself to be indebted to A. in £ , to be paid on demand for value received." On demurrer to the declaration, the court, after solemn argument, held that this was a good note within the statute. *Casborne v. Dutton*, 1 Selwyn's Nisi Prius, 530. In the case of *Morris v. Lee*, the words were, "I promise to be accountable to J. S., or order, for £50, value received by me," and it was held a good promissory note. The court say they "will take the word *accountable* as much as if it had been *pay*." They also notice the words *value received*. *FORRESON, J.*, said, "This is a debt, being for value received, and not said on account." 8 Mod. 362; 1 Strange, 629; S. C., 2 Ld. Raym. 1306.

Turning to the American cases, we find in our own court the case of *Smith v. Allen*, 5 Day, 387. This was brought on a paper in these words: "Due John Allen \$94.91, on demand." The declaration counted on a promissory note, and alleged a promise to pay in the usual form, setting out the note in the declaration. The defendants demurred, and the Superior Court held the declaration sufficient. On writ of error brought, the Court of Errors sustained the decision.

Here was manifestly no express promise to pay; but the court held that there was one implied, and so sustained the claim of the plaintiff. The difference between this and the case at bar is very slight. This contains the words "on demand," that at bar the words "value received." The one by its terms is due on demand, and the promisee to pay is, therefore, implied by law; the other is, in legal effect, due on demand, and it is difficult to see a good reason why the law does not as readily imply a promise to pay such a debt, as one due on demand by its own terms. Besides, a valuable consideration is expressed in the case at bar by the words "value received," while none is expressed in the case of *Smith v. Allen*. Since the case of *Edgerton v. Edgerton*, 8 Conn. 6, and the case of *Bristol v. Warner*, 19 Id. 7, it is quite clear that, by the law of this State, a promissory note, not negotiable, and not purporting on its face to be for value received, does not imply a consideration. *Smith v. Allen* and the case at bar are alike in omitting the words "or order," and "or bearer," and so are alike non-negotiable. Such notes, however, are regarded as within the statute of 3 and 4 Anne. *Smith v. Kendall*, 6 T. R. 123.

Passing from this decision in our own court to the courts of New York, where we are accustomed to find questions of mercantile and commercial law as ably discussed and as intelligently decided as in any of our sister States, we find the case of *Russell v. Whipple*, 2 Cow. 536. The suit was on this paper: "Due S., or bearer, \$10." This differs from the case at bar in adding the words "or bearer," and omits the words "value received." The court said it was a promissory note, and that the case was too plain for argument.

In *Kimball v. Huntington*, 10 Wend. 675, this paper, "Due R. \$325, payable on demand," was held admissible in evidence as a promissory note. Judge NELSON says: "The acknowledgment of indebtedness, on its face, implies a promise to pay the plaintiff, and the payment by its terms is to be in money absolutely, on demand."

In *Luqueer v. Prosser*, 1 Hill, 259, Judge COWAN says: "If there be in legal effect an absolute promise that money shall be paid, all the rest is a dispute

Mather v. Chapman.

about words. * * * The whole inquiry is, does the paper import an engagement that money shall be paid, absolutely? If it do, no matter by what words, it is a good note."

In *Sackett v. Spencer*, 20 Barb. 120, this paper, "Due S. or bearer, \$340, for value received with interest," the court say "is a good promissory note, and if it specifies no time of payment, it is, in legal effect, payable immediately, and without grace."

In *Franklin v. March*, 6 N. H. 304, the Supreme Court of New Hampshire held this paper, "Good to R. C. or order, for \$30, borrowed money," to be a good promissory note.

In addition to the cases above cited, the following are very strong authorities to sustain the claim that this is a promissory note. *Cummings v. Freeman*, 2 Humph. 143; *Harrow v. Dugan*, 6 Dana, 341; *Fleming v. Burge*, 6 Ala. 373; *Finney v. Shirley*, 7 Mo. 42; *McGowan v. West*, id. 569; *Lorne v. Murphy*, 9 Ga. 338. In *Johnson v. Johnson*, 1 Ala. 263, the court say: "The acknowledgment of a debt, due for a valuable consideration, clearly implies a promise to pay it on request."

The record discloses the fact that the paper before us was given for the purchase of clothing, and that the price of it has never been paid. Our statute of limitation bars all right of action upon it, unless it is recognised as a promissory note. So to recognize it will in my opinion do much less violence to law than will be done to justice if we permit this defendant thus to escape the payment of an honest debt for the necessities of life.

I would admit the paper offered in evidence in support of the first count in the declaration.

In this opinion PHILPS, J., concurred.

MATHER V. CHAPMAN.

(40 Conn. 382.)

Sea shore — right to sea-weed

Sea-weed cast upon the shore between high and low-water mark belongs to the public, and may be lawfully appropriated by any person. (*See note, p. 51*).

TRESPASS for taking and carrying away a quantity of sea-weed which had been thrown by the action of the sea upon the shore of Jupiter Point, below high-water mark. So far as material to the principal point in the case, the opinion contains the facts.

Lippitt and Halsey, for plaintiffs.

Brandegee and Waller, for defendant.

Mather v. Chapman.

SEYMOUR, C. J. The first count of the plaintiffs' declaration is in trespass for the taking and converting to his own use by the defendant of large quantities of sea-weed alleged to be the proper goods and estate of the plaintiffs. This sea-weed was cast upon the shore adjoining the defendant's land, and was there, below high-water mark, taken by the defendant and converted to his own use. The Court of Common Pleas, against the request of the plaintiffs, instructed the jury, in substance, that sea-weed cast and left upon the shore (that is, between ordinary high and low-water mark) *prima facie* belongs to the public and may lawfully be appropriated by the first occupant.

To this charge the plaintiffs object, and the principal question in the case arises upon this objection.

A different question arises under the second count, which will be considered in its proper place.

It is conceded that by the settled law of Connecticut the title of a riparian proprietor terminates at ordinary high-water mark. It is also conceded that though his title in fee thus terminates, yet he has certain privileges in the adjoining waters.

Among the most important of these privileges are: (1.) That of access to the deep sea; (2.) The right to extend his lands into the water by means of wharves, subject to the qualification that he thereby does no injury to the free navigation of the water by the public; (3.) The right by accretion to whatever lands by natural or artificial means are reclaimed from the sea, subject, however, to certain qualifications not necessary here to be mentioned.

The plaintiffs claim that among the privileges of the riparian proprietor is also that of the exclusive right to the sea-weed which is cast upon the shore and left there by the receding tide.

In respect to the weed cast by extraordinary floods upon the land of the proprietor and there left above ordinary high-water mark, the law of this State is settled, in conformity with what we understand to be the common law of England. The owner of the soil has it *ratione soli*. No other person can then take it without a trespass upon the owner's land, and as owner of the land he is deemed to be constructively the first occupant.

But below high-water mark the soil does not belong to the owner of the upland. The sea-weed in dispute was not taken from the plaintiffs' land, and their title, if they have a title, is not *ratione soli*. No trespass on the plaintiffs' land was committed by the

defendant in taking the weed, for the taking of which recovery is sought in this court.

Upon what ground then can the plaintiffs sustain the title which they claim to the weed? While it was floating on the tide it was *publici juris*. Why, when it is left on the shore by the receding tide, should it become their property?

In Massachusetts and Maine, by virtue of the Colonial Ordinance of 1641, the individual title of proprietors adjoining navigable water extends to low-water mark. Sea-weed left by the receding tides being then on private property, the owner of the soil has title *ratione soli* not only to sea-weed but to other articles cast upon and left on the shore. Thus in *Barker v. Bates*, 13 Pick. 255, a stick of timber was thrown up and had lodged on the shore within the old colony of Plymouth. The question is largely discussed by SHAW, C. J., whether the ordinance of 1641 extends to the colony of Plymouth. That being settled, the learned judge proceeds to say: "Considering it as thus established that the place upon which this timber was thrown and had lodged was the soil and freehold of the plaintiff, the defendants cannot justify their entry for the purpose of taking away or marking the timber. We are of opinion that such entry was a trespass, and that, as between the plaintiff and defendant, the plaintiff had, in virtue of his title to the soil, the preferable right of possession, and that the plaintiff has a right to recover the agreed value of the timber."

The cases therefore in Massachusetts and Maine which decide that sea-weed left on the shore belongs to the riparian proprietor have no application here. In New Hampshire the Massachusetts ordinance is adopted as law.

In New York the common-law rule is adopted, as with us, in relation to the boundary line between the public and the riparian proprietor, and it is claimed that in *Emans v. Turnbull*, 2 Johns. 313, the question before us is decided in conformity with the plaintiffs' claim. The judgment in that case is pronounced by a judge of profound learning, whose opinion upon the point now under discussion, if really given, would be entitled to great weight; but we are inclined to think that the sea-weed in that case was cast upon the land of the plaintiff. The main argument at the bar and on the bench relates to the title to the *locus in quo*. Chief Justice KENT says: "If the marine increase be by small and imperceptible degrees, it goes to the owner of the land. The sea-weed must be supposed to have accumulated gradually."

Mather v. Chapman.

In the case we are called on to decide, the sea-weed could not be regarded as a marine increase of the plaintiffs' land, for it had not reached their land and was not attached to it nor connected with it. To be a marine increase it must form part and parcel of the land itself. Being between high and low-water mark, at each returning tide it would be afloat, and, even in Massachusetts, sea-weed when afloat is *publici juris*, although floating over soil which is private property.

The sea-weed in this suit is not treated as part of the real estate which by small and imperceptible degrees had become part of the plaintiffs' land. It is treated as personal property, and the defendant is sued for taking it as such and converting it to his own use. In the case of *Emans v. Turnbull* the plaintiff's title was held good upon a liberal construction of the *jus alluvionis*, which implies that the weed had then become part and parcel of the plaintiff's land, and must therefore have been above, or upon, ordinary high-water mark. Title to personal property, *jure alluvionis*, would be a novelty in the law. 2 Black. Com. 262. Title by accretion is substantially the same as by alluvion. Both are modes of acquiring title to real property.

Title however to personal property may be acquired by what in law is called accession; but to acquire title by accession the accessory thing must be united to the principal, so as to constitute part and parcel of it. "Accessio" is defined by Bouvier, as a "manner of acquiring the property in a thing which becomes *united* with that which a person already possesses." The plaintiffs therefore seem to us to have no title by alluvion, or by accretion, or by accession, certainly none *ratione soli*, and they cannot be regarded as first occupants by construction merely because of the *propinquity* of their land to the property in dispute.

The question under discussion does not seem to be fully settled in England. The soil of the sea-shore is there, as with us, *prima facie* in the public, but it may become private property, and frequently is so, where the adjoining lands are part of the manor. The authority of Bracton is clearly in favor (1st) of the common right of all to the shores of the sea as *part of the sea itself*. (2d.) In Liber 2, speaking of the right of first occupancy, he says "*Item, locum habet eadem species occupationis in iis quæ communia sunt, sicut in mare et littore maris, in lappillis et geminis et ceteris in littore maris inventis.*" Sea-weed must be included within the *et ceteris* of

Bracton in this passage, and upon his authority belongs to the first occupant.

The opinion of Lord HALE in favor of the common right to take sea-weed on the shore is shown by the following passage in chapter 6 of Hale's *de Jure Maris*. After speaking of three kinds of shore he says, "This kind of shore, to wit, that which is covered by the ordinary flux of the ocean, may belong to a subject, and may be parcel of a manor, and the evidences to prove it parcel of a manor are commonly these, constant and usual fetching of gravel and sea-weed and sea-sand, between high and low-water mark, and *licensing others so to do.*"

In the case, however, of *Bagott v. Orr*, 2 Bos. & Pul. 472, the court expressed doubts upon the right of the public to come upon the shore and take shells which had been thrown up and left there by the tide. In the case of *Blundell v. Catterall*, 5 Barn. & Ald. 268, there occurs a very learned and interesting discussion upon the right of the public between high and low-water mark, but the precise question now under consideration is not made the subject of comment.

The case of *Church v. Meeker*, 34 Conn. 421, is relied upon by both parties. We think the opinion of Judge BUTLER in that case must be construed as applicable solely to sea-weed found as it here was above high-water mark.

In the case of *Peck v. Lockwood*, 5 Day, 22, the plaintiff owned a portion of the shore below ordinary high-water mark, and it was held that he could not maintain trespass against the defendant, who entered the premises when the tide was out and dug for shell-fish and carried the fish away. That is a strong case in favor of the common right of fishing.

But the right of taking sea-weed would seem to stand on the same ground as the right of taking fish. We see no reason for making a distinction between the vegetable and animal products of the ocean. Neither, in the state of nature, is the property of any one; the title to both depends upon the first occupancy. It is agreed that while afloat both are alike common; why, when the tide recedes and leaves shell-fish and sea-weed on the shore, should the sea-weed belong to the riparian proprietor when confessedly the shell-fish remains common property?

We think the charge of the judge in regard to the first count was correct.

[The remainder of the opinion is not of general interest.]

Mather v. Chapman.

NOTE. — The case of *Bagott v. Orr*, 2 Bos. & Pull. 472, turned upon two points: 1. Whether the subjects of the realm had a general common-law right to catch and take *shell-fish* on the sea-shore, between the flux and reflux of the tides; 2. Whether the subjects of the realm had a general common-law right of digging, collecting and carrying away for use, *sea shells*, and by consequence any other portion of the *soil* of the sea-shore. It was an action of trespass by Bagott against Orr. The first count was the breaking and entering plaintiff's close, and the *sea-shore* in the parish of Keysham, and plaintiff's *shell-fish* and *shells*, there finding, catching, taking and carrying away and converting thereof to defendant's own use. The second count was for treading and trampling upon plaintiff's *soil*, etc., and breaking, crushing and destroying plaintiff's *shell-fish* and *shells*, and carrying away the same. There were several other counts for breaking and entering plaintiff's *several fishery* and his *free fishing*, on which issues in fact were joined. The defendant pleaded, first, the general issue; second, that the *locus in quo* was and had from time immemorial been parcel of a *certain arm of the sea* in which every subject of the realm had the right and privilege of fishing and catching, digging for, raising, taking and carrying away *shell-fish* and *shells*, and defendant being a subject of the realm had done the acts complained of in pursuance of said rights. Thereupon the plaintiff new assigned, alleging that defendant broke and entered plaintiff's close in the first count mentioned, "being certain closes lying *between the flux and reflux of the tides of the sea* in plaintiff's manor of Keysham, and the said *shell-fish* and *shells* there found, caught, took, and carried away and converted and disposed thereof, where the same closes in which, etc., were left dry and not covered with water." Defendant pleaded among other things that said *shell-fish* and *shells* were left by the ebbing of the tide upon said spot; but a little before the said taking, and that the defendant, as a subject of the realm, had a right to take and carry away the *shell-fish* and *shells*. It appears that the plaintiff asserted the said closes "were lying within the flux and reflux of the sea *within* the plaintiff's manor," and his ownership of these closes (being part of the *sea-shore*) was not disputed. In virtue of this ownership, Bagott denied the right of the defendant to catch *shell-fish*, and also his right to carry away for use *sea shells*. The report says: "The court were of opinion that if the plaintiff had it in his power to abridge the common-law right of the subject to the *shell-fish*, he should have replied that matter specially, and that not having done so the defendant must succeed upon his plea as far as related to the taking of the *fish*; but observed that as no authority had been cited to support his claim to take *shells* they should pause before they established a general right of that kind." "It is to be regretted," says a learned writer, commenting on this case "that a fuller report of the judgment in this case has not been given (if more was said); but it seems to be understood that the court affirmed the general common-law right of the subject, to take or catch '*shell-fish*,' but doubted whether any such general common-law right existed for the subject to take *shells*; meaning, it is presumed, shells of fish destroyed by natural causes before capture, otherwise the decision would have much of the character and effect of that recorded in the '*Merchant of Venice*.'" Hall's Sea Shore, 191.

With regard to the question of right to dig for shells, sand, etc., a technical distinction is to be noted between a mere right of egress and regress, or way and a right to dig and take away the soil. The first is in law a mere easement while the other is a *profit-à-prendre*. For a learned discussion as to taking *profits-à-prendre* in the wastes of inland manors, and of their analogy to digging for shells, etc., on the shore, see Hall's Sea Shore, (2d ed., London, 1876),

195. A *profit-à-prendre* in another's soil cannot be claimed by custom, however ancient, uniform and clear, the exercise of that custom may be. *Attorney-General v. Mathias*, 27 L. J. Ch. 761.

In the case of *Grimstead v. Marlowe*, 4 T. R. 717, it was laid down by Lord KENTON that a man must prescribe in a *que estate* for a *profit-à-prendre* which a mere "inhabitant" or "resident" cannot do; and it seems settled that where an *inhabitant of a town* would claim a *profit-à-prendre* he must prescribe that "he and all those whose estate he hath in his house have used to . . . have common," etc., as in *Mellor v. Spateman*, 1 Saund. 339. See *Lockwood v. Ward*, 6 Q. B. 50.

HALL, further commenting on the case of *Bagott v. Orr*, said: "Looking at the general claim as *res integra* it must be admitted that there is reason to presume that the 'inhabitants' of all the districts bordering on the sea-coasts of England have *actually* (whether now allowed to be *lawfully* or not) been in the *habit* of resorting to the 'shore' for the materials in question, for manure and other useful purposes, without asking consent of the owner of the adjacent *terra firma*; and it would be difficult to find a cultivated and inhabited spot on or within reasonable distance from the coast, where it has not been the practice of the inhabitants to resort to the shore for materials for manure for ballast, for building, road mending, etc. It is the natural if not the necessary result of their locality and wants. It is not to be looked at as a want confined to these persons only, who are immediately dwelling on the sea-side, but may be reasonably extended to all within convenient reach of it; to all such in fact as have, by a like immemorial usage, established a general right to fish. It may also be remarked that where such general inducement exists everywhere along the coasts of England to use such materials, and yet no case is to be found *supporting* the practice as a local and limited custom or *denying* it as a general right (if we except *Bagott v. Orr*), the presumption is in favor of it as a general custom." In behalf of the common-law right and in support of its desirableness, the same writer dwells at length upon the antiquity of the custom of using marine manures in agriculture; of its general character and of its importance to the agricultural interests, and upon the doctrine of Lord KENTON (*Ball v. Herbert*, T. R. 261) that "common-law rights are either to be found in the opinions of lawyers, delivered as axioms or to be collected from the universal and immemorial usage throughout the country," insists that the general common-law right may well be sustained.

The case of *Blundell v. Caterall*, 5 Barn. & Ald. 268, involved the question of the general right to frequent the shore for sea bathing. The plaintiff who resisted the right "was the lord of the manor Great Crosby, which is bounded on the west by the river Mersey, an arm of the sea." It is stated in the report of the case "that as lord of the manor he was *owner* of the *shore* and had the exclusive right of *fishing* thereon with stake-nets. The defendant was the servant at an hotel erected in 1815 upon land in Great Crosby, fronting the shore and bounded by the high-water mark of the river Mersey, the proprietors of which hotel kept bathing machines for the use of persons resorting thither, and who were driven by the defendant in machines across the shore into the sea, for the purpose of bathing; and the defendant received a sum of money from the individuals so bathing for the use of the machines, and for his services and assistance. No bathing machines were ever used upon the shore of Great Crosby before the establishment of this hotel; but it had been the custom for the people to cross it on foot for the purpose of bathing. There was also a common highway for carriages along the shore, and it was proved that various

Mather v. Chapman.

articles for market were occasionally carted across the shore, although the more common mode of conveyance for such things was by a canal made about forty years ago. The defendant contended for a *common-law right*, for all the king's subjects to bathe on the sea-shore, and to pass over it for *that* purpose on foot and with horses and carriages. It was decided by three of the judges against one that no such *general* right in the subject to frequent the shore for the purpose of bathing, existed whether on foot or in carriages. This was the first case in which the public right to use the sea and sea-shore for bathing was ever judicially either claimed or opposed as was remarked by Mr. Justice BAGLEY. The case was very fully argued, and the judges gave their opinions at length. The plaintiff's counsel opposed the right on the following three grounds: 1. From the silence of the authorities; 2. Because such a right was contrary to analogies; 3. Because it was contrary to acknowledged and established rights, and the three judges by whom the case was decided seem to have been governed by the first and last of these several grounds of argument. This decision and the grounds upon which it is based are examined at great length in "*Hall on the Sea Shore*," (London, 1875) 156 *et seq.*, and very satisfactorily answered.

The same author says, p. 92, "with regard to the constant and usual fetching of sea-sand, sea-weed and gravel, between the high-water and low-water mark, and licensing others so to do; and embanking against the sea, and enjoyment of what is so inned; these, it must be admitted, are all acts likely to be done by the owners of the soil; and they afford color that he who does these acts is such owner; but these acts *may* be usurpations or intrusions on the king's ownership and *prima facie* are so. As to the right of digging for sand, the authorities show that this may and often does exist without conferring any title whatever to the land; for similar rights are exercised by the tenant in the wastes of a lord's manor, and yet the tenants have no title to the soil; but such rights are mere *profits-à-prendre*." The lord of the manor cannot acquire an exclusive right to cut sea-weed below high-water mark unless by grant of the king, or such long and undisturbed enjoyment as to give him title by prescription; *Benest v. Pèron*, 1 Knapp, 68, and evidence of such acts of ownership as licenses to take shingle, sand and sea-weed, is receivable to support the presumption of a grant of the soil of the shore, etc. *Strange v. Rowe*, 4 F. & F. 1048. That was an action by the lord of the manor for taking shell fish and shingle from the fore shore of the manor, between high and low-water mark, his title being under a royal grant of the manor with anchorage and groundage, but with no express mention of the shore. It was held that this grant afforded of itself presumption that it included the soil of the shore. See also *Healey v. Thorne*, 4 Ir. C. L. R. 495.

In *Hove v. Stowell*, 1 Alcock & Nap. 348, which was an action of trespass for breaking and entering the plaintiff's close, a plea of justification that the close was the sea-shore and that all the subjects of the king had the right to enter and carry away the sea-weed, was held to be bad.

Sea-weed thrown up by extraordinary tides belongs to the riparian proprietor upon whose land it is thrown. *Lowe v. Govett*, 3 B. & Ad. 967.

In *Emans v. Turnbull*, 2 Johns. 312, the *locus in quo* was very clearly held to be in the defendant. The action was trespass for assaulting the plaintiff and detaining him. Plea, that plaintiff had entered defendant's close and was about to remove sea-weed therefrom when defendant prevented him; replication that defendant was not possessed of the close nor owner of the sea-weed; rejoinder that defendant was so possessed and was such owner and this was the

issue. It being held that defendant was possessed of the *locus in quo* it followed that the sea-weed was his. What is said by Chief Justice KENT about the *ius alluvionis* could be explained or justified only upon the theory that the shore belonged to the defendant.

In the learned note added by Judge COWEN to *Ex parte Jennings*, 6 Cow. 518, he says: "The treatise of Sir MATTHEW HALE, *De Jure Maris*, has been so often recognised in this country and in England that it has become the text-book, from which, if properly understood, there seems to be no appeal, either by sovereign or subject, upon any question relating to their respective rights either in the sea, arms of the sea or private streams of water," and he gives, as part of the note, the first four chapters of that treatise—those relating to private and to public streams. As, notwithstanding the high authority of this treatise, its text is not easily accessible in this country, we give, following, the text *verbatim* of chapters five and six, which, with the chapters given by Judge COWEN, constitute the entire treatise, except one chapter, the seventh, relating to Wrecks and Royal Fishes.

A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM.

FROM A MANUSCRIPT AScribed TO LORD CHIEF JUSTICE HALE.

CAP. V.

The right which a subject may have in the creeks or arms of the sea, and how it may be acquired.

Although the king hath *primâ facie* this right in the arms and creeks of the sea *communis jure*, and in common presumption, yet a subject may have such a right.

And this he may have two ways: 1st. By the king's charter or grant; and this is without question. The king may grant fishing within a creek of the sea or in some known precinct that hath known bounds, though within the main sea. He may also grant that very interest itself, *viz.*, a navigable river that is an arm of the sea, the water and soil thereof. He may also grant a manor *cum littore maris eidem adjacentis*; and the shore itself will pass, though in gross and not parcel of the manor. He may also grant a manor or land contiguous to the sea, *und cum maritimis incrementis*, and that will pass that *ius alluvionis* whereof before. *Vide Cartæ Antiquæ G. 15; Grant 6. Johannis* to the abbott *de Bello loco, viz., alveum super quem abbatia fundata est à vado de Hartford cum fluxu maris in ascendendo et descendendo inter utramque ripam.*

Vide ibidem, l. 17. Cartâ Willielmi primi abbati sancti Augustini de totâ terrâ Bezanore et totum litus usque medietatem aquæ.

Vide ibidem, Cartâ Knuti monachis sancti Augustini de terrâ insulâ Thanet, tam in terrâ quàm in mari et littore.

Vide ibidem, F. 17. A grant by King William the First to the monks of Trinity, Canterbury, of divers liberties in their possessions *in terrâ et in mari.*

Vide Cartâ Antiquâ, O. 1. A grant by Edward the Confessor to the abbey of Hulin, *videlicet, wreckum in mari et in littore maris et in portibus maris. Cartâ Antiquâ, D. D. 24.*

But it seems the grant of *incrementa maritima* will not pres lands that often happen to be relict by the sea, because that is not so properly *maritimum incre-*

Mather v. Chapman.

mentum. And, besides, the soil itself under the water is actually the king's and cannot pass from him by such an incertain grant as *maritima incrementa*; but it must pass a present interest.

But if the king will grant land adjacent to the sea, *und cum mille acris terre aquæ maris coopertis eadem terre secundum consuetudinem, etc., adjacentibus*; such a grant, as it may be penned, will pass the soil itself; and if there shall be a recess of the sea leaving such a quantity of land, it will belong to the grantee.

2d. The second right is that which is acquired or acquirable to a subject by custom or prescription; and I think it very clear that the subject may by custom and usage or prescription have the true propriety and interest of many of these several maritime interests which we have before stated to be *primâ facie* belonging to the king. I will go over them particularly, and set down which of these interests are acquirable by usage or prescription by a subject.

A subject may by prescription have the interest of fishing in an arm of the sea, in a creek or port of the sea, or in a certain precinct or extent lying within the sea; and these not only free fishing but several fishing.

Fishing may be of two kinds ordinarily, viz., the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing that ariseth by and from the propriety of the soil. Such are *gurgites*, *wiers*, fishing-places, *borachies*, *stachies*, etc., which are the very soil itself, and so frequently agreed in our books. And such as these a subject may have by usage, either in gross, as many religious houses had, or as parcel of or appendant to their manors, as both corporations and others have had, and this not only in navigable rivers and arms of the sea, but in creeks and ports and havens, yea, and in certain known limits in the open sea contiguous to the shore.

And these kinds of fishing are not only for small sea fish, as herrings, sprats, *ichers*, etc., but for great fish, as salmons, which, though they are great fish, are not royal fish, as the report of Sir John Davys in the case of the fishing of Banne would intimate. And not only for smaller fish and salmons, but even royal fish, as whale, sturgeon, porpoise, which, though they are royal fish and *primâ facie* and of common right do belong to the king, yet a subject may prescribe even for these as appurtenant to his manor, as is unquestionably agreed by our books.

Now for precedents touching such rights of fishing in the sea and arms and creeks thereof, belonging by usage to subjects, the most whereof will appear to be by reason of the propriety of the very water and soil wherein the fishing is, and some of them even within the ports of the sea.

P. 4, E. 1, B. R. *Surrey*. The prior of Stoke brings trespass for the fishing in *aquæ de Shurmer* against Hamon Clever. The defendant justified *quod piscavit in communis aquæ ipsius Hamonis ex parte comitatûs Suffolchiæ, ubi ipse et antecessores sui semper solebant piscare*. The prior dicit, *quod Michaelvus ipsius Hamonis dedit totum jus, quod dicebat se habere in piscariâ maris de le Shurmer Deo et sancto Johanni de Stoke, etc.*

P. 34, E. 1, B. R. *Rat. 14, Kanota*. Prior de *Contingshed* implaciat *abbatem de Furney* pro prostratione *gurgitis* in *aquæ de Ulverstone*. The defendant justified, because each end of the weir was fastened upon the abbot's land. The abbot replies, *quod Willielmus de Lancaster dominus de Kendal dedit prædecessori suæ ipsius prædictæ aquam et piscariam ex utràque parte ejusdem quantum impetus maris fluit et refluit*.

Mather v. Chapman.

Vide Rastall's Entries, trespass in piscary, pl. 4. Prescription per several fishing in aquâ maritimâ fluentis et refluxantis in sæsonabili tempore cum, 7 stallis separatis separalis piscariis factis pro redditibus.

P. 35, E. 1, B. R. Rot. 18, Suffolchiæ. Willielmus Braham implectat Ricardum S. et 7 alios pro piscatione in separatis piscariis suis apud Braham. Defendens dicit, quoddam predicta piscaria est quoddam brachium maris et communis piscaria totius maris et aliorum, et non separatis piscaria. Ideo veniat jurata.

Whereby it is admitted, though *primâ facie* an arm of the sea be in point of propriety the king's, and *primâ facie* it is common for every subject to fish there, yet a subject may have by usage a several fishing there exclusive of that common liberty which otherwise of common right belongs to all the king's subjects.

Trin. 10, E. 2, B. R. Rot. 88, Norfolchiæ. The abbot of St. Benedict Hulm impleads divers for fishing in riparia, quas se extendit à ponte de Wrocam usque quandam lacum vocatam Blackdam. Pending the suit the king's attorney came in and alleged for the king, quoddam predicta riparia est brachium maris, quæ se extendit in salinum mare, et est riparia domini regis salua fluens et refluxans, ubi naves et battelli ventunt et applicant extra magnum mare carcassi et discarcati quieti abque tolneto seu custuma alicui dando, et est communis piscaria quibuscumque; et dicit, quoddam presentatem fuit in ultimo itinere coram Solomone de Roffa et sociis suis iusticiariis itinerantibus in comitatu isto, quod prædecessor predicti abbatis fecit purpresturam super dominum regem in ripariâ predictâ, gurgites plantando in eadem et appropriando sibi predictam piscariam tenendo tanquam separalem, per quod consideratum fuit, quod gurgites illi amoverentur, et quod predictâ aqua remaneret communis piscaria. Et petit, quod ne procedatur ad aliquam inquisitionem inde capiendam, quousque præfati iusti iurati super recordo et processu predictis certificentur. Thereupon search is granted, and the record certified. And afterward a proceeding was obtained; and issue being joined it was found for the abbot, and judgment and execution given against the defendants for the damages, viz., £200.

Upon which record these things are observable.

1st. That *de communis jure* the right of such arms of the sea belongs to the king.

2d. That yet in such arms of the sea the subjects in general have *primâ facie* a common of fishing as in the main sea.

3d. That yet a subject may have a separate right of fishing exclusive of the king and of the common right of the subject.

4th. That in this case the right of the abbot to have a several fishing was not a bare right of liberty or profit à prendre; but the right of the very water and soil itself. for he made weares in it.

Escatría, 12 E. 1 n. 1. The earls of Devon had not only the port of Toppeham, de quo supra; but the record tells us that portus et piscaria et mariscus de Toppeham spectat Amicis comitibus Devon.

Mich. 13, 14, E. 1 B. R. Rot. 10. The abbot of Tichfend impleaded the burgesses of Southampton, quod deripuerunt gurgitem suam apud Cadeland. Burgenses respondent, quoddam ipsa gurgis levata fuit ad nocumentum domini regis et villæ Southampton, et quod battelli et naves impediuntur, quo minus venire non possunt ad portum villæ predictæ. Juratores dicunt quoddam à tempore quo, etc., non fuit ibi aliqua gurgis, sed antiquitus solebant stare paki per quod credunt quoddam tunc fuit prostrata gurgis eadem occasione quâ modo, eo quoddam fuit ad nocumentum transeuntium.

Upon which record these things are observable:

1st. That a subject may, by prescription, have a wear in the sea, and consequently have an interest below the low-water mark, for probably weares be such.

Mather v. Chapman.

2d. That, yet if it be a nuisance to the passage of ships, it may be abated.

7th Rep. 15. It appears that the abbot of Abbotsbury, before dissolution, had not only a game of swans, but the fishing, yea, and the soil of an arm or creek of the sea called a meere or fleet, *in quam mare fluit et refluit*: and it came to the king by the dissolution of the monastery.

And in many considerable arms of the sea that were navigable rivers, and flowed and reflowed with salt water, divers persons had weares and local fishing sluices. As, for instance, in the river of Severn the earls of Lancaster had certain weares called Radley weares, part of his manor of Radley. *Clause 10, E. 3, m. 29.* The like for others in the river of Tese. *Patentes 32, E. 3, para. 1, m. 15, dorso in Tweede, fines 2, E. 3, m. 1, in Trent; Pat. 18, E. 2, para. 1, m. 8 dorso Pas. 43, H. 3, m. dorso in Severn; Pat. 2, E. 4, para. 3, m. 15, dorso; Pat. 32, E. 3, para. 2, m. 15, dorso in Ose; Pat. 12, E. 2, para. 1, m. 3.*

Trin. 50, E. 3, B. R. rot. 2, Essex. Walterus filius Walteri monstrat domino regi quoddam piscaria vocata le Reysand ab antiquo ut parcella maneris sui de Burnham appendebat, dominus rex per cartam suam eam concessit durante minore etate sua cuidam Bartholomeo Stigonne qui predictam piscariam detinet ad pre-judicium et exheredationem dicta Walteri. And, thereupon, a *soire facias* awarded. The defendant prayed aid of the king, and after a *procedendo*, they plead to issue, and the jury find that *dicta piscaria est parcella maneris predicti. Ideo consideratum est, quoddam predicta piscaria, cum gurgitibus eidem pertinentibus dicto Waltero liberentur.*

Infinite more of this kind might be produced. I shall add no more here, but in the subsequent parts of this and the next chapter, some other instances of this nature will occur, which be applicable to the prescription of the right of fishing in navigable rivers; and I have added the more because there are certain glances and intimations in the case of the piscary of Banne, in Sir John Davys' reports, as if the fishing in these kind of royal rivers were not acquirable but by special charter, which is certainly untrue, for they are acquirable by prescription or usage as well as royal fish may be.

It is true, that by the statute of *Magna Charta, cap. 23, Omnes leideilli depouantur de cetero penitus per Thamistam et Medwayam per totam Angliam, nisi per easteram maris.*

And this statute was seconded with others that were more effectual, viz.: 25 E. 3, cap. 4; 1 H. 4, 12; 12 E. 4, cap. 7.

And by force of these statutes, weares, that were prejudicial to the passage of vessels, were to be pulled down, and accordingly it was done in many places. But that did no way disaffirm the propriety, but only remove the annoyance, which, as before is shown, was not to be allowed in an inland river, if it be a common passage.

The exception of weares upon the sea-coasts, and likewise frequent examples, some whereof are before mentioned, make it appear that there might be such private interests not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark, for such were regularly all weares. But as by the statutes of 25 E. 3, cap. 4; 45 id. cap. 2; 1 H. 4, 12; 4 id. cap. 11, and other statutes, the erecting of new weares and inhancing of old is provided against in navigable rivers; and by other statutes particular provision is made against weares, new or old, erected in particular ports (as in the port of Newcastle, by the statute of the 21 H. 1, cap. 18; in the port of Southampton, by the statutes of 11 H. 7, cap. 5; 14 H. 3, cap. 18; in the rivers of Ouse and Humber, by the statute of 23 H. 8, cap. 18; in the river and port of Exeter, by the statute of 41 H. 8, cap. 4; in the river of Thames, by the statutes of 4 H. 7, cap. 15; 27 H.

8. cap. 18; 3 Jac. cap. 20, and divers others); so by the statute of 3 Jac. cap. 12, all new weares erected upon the sea shore, or in any haven, harbor or creek, or within five miles of the mouth of any haven or creek, are prohibited under a penalty. But in all these statutes, though they prohibit the thing, yet they do admit that there may be such an interest lodged in a subject, not only in navigable rivers but even in the ports of the sea itself contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty but also a right or propriety of soil. But yet this, that I have said, must be taken with this allay, which I have in part premised.

1st. That this interest or right in the subject must be so used as it may not occasion a common annoyance to passage of ships or boats, for that is prohibited by the common law, and these several statutes before mentioned, viz.: erecting new weares, inhancing old, fixing of pikes or stakes, and the like, in order to fishing, for the *jus privatum*, that is acquired to the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use.

2d. That the fishing, that a subject hath in this or any other private or public river or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many.

And this gives me an occasion to divert to the examination of those commissions that have been granted in common rivers, commonly called commissions of conservancy or water-bailiffs; which commissions have of late time especially been granted in all the great rivers in England, and under which the patentees have exercised a jurisdiction irregularly enough and to the damage of the people, and under the disguise of a public good have filled their own purses with the money exacted from the people. Therefore touching their office.

1st. The office of a water-bailie or *scrutator* is a bare ministerial officer, which the king doth or may appoint in those rivers or places that are his in franchise or interest. And his business was to look to the king's rights as his wrecks, his flotaon, jetson, water-strays, royal fishes. And he had no jurisdiction at all *quod talis*, but his office was only ministerial, to receive and account for the casualties belonging to the king upon public or great rivers, which did or in common presumption might belong to the crown. Such was that office of searcher, *scrutator* or bailie of the river of Severn, *usque ad pontem Wigornia*. Pat. 27, H. 6, parte 2, m. 20; Pat. 8, E. 4, parte 1, m. 23.

2d. The office of conservator of rivers, and fish in rivers; and of these patents of conservancy we find mention in the statute 1 Ellis. cap. 17. And by a grant made to the city of London, and confirmed by the parliament of 17 R. 2, cap. 9, the conservancy of the river Thames from Stainsbridge down to Medway is granted to the mayor of London.

This office of conservancy is of two kinds, or rather there are or may be two branches thereof.

1st. The conservancy in order to nuisances in rivers. This is grounded upon the statute of 1 H. 4, cap. 12, whereby it is enacted that there shall be commissions granted to survey and keep the waters and great rivers, and to correct and amend the defaults. And this for Thames annexed to the mayor of London also by the statutes of 4 H. 7, cap. 15; 27 H. 8, cap. 18.

2d. The conservancy in order to fishing. And this is that which is mentioned in the statute of 1 Ellis. cap. 17. And this is grounded upon the statute of Westminster 2, cap. 47, which enacted that the waters of Humber, Owse, Trent, Dove, Aire, Darwent, Wharfe, Niddiore, Swale, Tees, Tyne, Eden, *et omnes alie aquae in regno, in quibus salmones capiuntur, ponantur in*

Mather v. Chapman.

defenso, etc. Et in partibus ubi hujusmodi riparia fuerint, assignentur conservatores istius statuti, qui ad hoc jurati sepius videant et inquirant de hujusmodi transgressionibus. Et in primis transgressionibus puniantur per combustionem retium, et By the statute 13 R. 2, cap. 13, the former statute is confirmed, and the river Thames added, and the rivers of Lons, Wyse, Merse and Ribbell, and all other waters in the county of Lancaster be put in defense as to the taking of salmon, etc., and in parts where such rivers are, there shall be assigned and sworn good and sufficient conservators of this statute, as of the statute of Westminster.

But neither of these statutes extended to any rivers but such wherein salmon be. And inasmuch as such a commission could not be without the warrant of an act of parliament, as is observed truly by my Lord COKE upon the statute of Westminster 2, cap. 47, consequently their commission cannot extend further than that act warrants, viz. : to none but to those that are particularly named, or at least wherein salmon are.

By the statute of 17 R. 2, cap. 9, the justices of the peace are appointed conservators of these statutes, except only as to the conservancy of the river of Thames and Medway, annexed to the mayor of London.

By the statute of 1 Eliz. cap. 17, there is a further and more extensive provision against the destruction of other fish as well as salmon, and it limits, that the lord admiral, the mayor of London, lords of leets, etc., and all other persons, etc., which by grant or other lawful ways or means lawfully have the conservation or preservation of any rivers, shall have power within the precincts of their lawful jurisdiction to inquire of, by the oaths of twelve men, and to hear and determine such offenses.

This indeed doth enlarge the power of these conservators in respect of the offenses, but not in respect of the limit of their jurisdiction.

Upon all this, it follows :

1st. That these commissioners of conservancy have no power in reference to fishing, but in such places where salmon are or the rivers mentioned in the acts, though in those rivers they have jurisdiction as to other fish as well as salmon, and that the conservators have no power except in reference to nuisances in common or public rivers, and not in private nuisances between party and party.

2d. Consequently, not in the small rivers that fall into those rivers, for such small rivers as they are not named in the acts of Westminster 2, nor 13 R. 2, and they have not any salmon in them, and so not within their jurisdiction.

3d. But yet in those rivers particularly named in the statutes of Westminster 2 and 13 R. 2, or in such rivers where salmon are, they have power to inquire of all offenses contrary to the statute of 1 Eliz. because committed within the precinct of their jurisdiction.

4th. But then they must not convict nor fine men barely upon a presentment without a tryall, for such conviction without tryall is against law in any case, but a leete or swaunote court.

And therefore, all those offenses that are against the statute of 1 Eliz. within small rivers, are only punishable by the leete or by the justices of the peace at their sessions, who are general conservators by the statute of 17 R. 2, cap. 9, and not before these conservators by commission, except as to the offenses in Thames, which are inquirable by the mayor of London.

And thus much by the way concerning conservatorship and water baillees, and also concerning the right of fishing in the sea or arms thereof belonging to a subject, either by grant or prescription, either as a liberty or in respect of ownership of soil.

CAP. VI.

Concerning the ownership or propriety which a subject may have in the sea shore and maritime increments, etc.

I come now to those other parts of propriety which a subject may have by prescription or usage, viz.: the sea-shore and maritime increases, which, though we have before stated to belong *prima facie* to the king, yet they may belong to the subject in point of propriety, not only by charter or grants, whereof there can be but little doubt, but also by prescription or usage.

I. The shore of the sea.

There seems to be three sorts or shores, or *littora marina*, according to the various tides, viz.:

(1st.) The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials, and certainly this doth not *de jure communi* belonging to the crown. For such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject. And this is admitted of all hands.

(2d.) The spring tides, which happen thrice every month at full and change of the moon; and the shore in question is by some opinion not denominated by these tides neither, but the lands overflowed with these fluxes ordinarily belong to the subject *prima facie*, unless the king hath a prescription to the contrary. And the reason seems to be because for the most part the lands covered with these fluxes are dry and manurable, for at other tides the sea doth not cover them, and therefore touching these shores, some hold that common right speaks for the subject, unless there be an usage to entitle the crown, for this is not properly *littus maris*. And, therefore, it hath been held that where the king makes his title to land as *littus maris* or *parcella littoris marini*, it is not sufficient for him to make it appear to be overflowed at spring tides of this kind. *P. 8, Car. 1, in camera Scaccarii*, in the case of Vanhesdanke for lands in Norfolk; and so I have heard it was held *P. 15, Car. B. R. Sir Edw. Heron's case*, and *Tr. 17, Car. 2*, in the case of the Lady Wandesford, for a town called the Cowes in the Isle of Wight, *in Scaccario*.

(3.) Ordinary tides or nepe tides, which happen between the full and change of the moon, and this is that which is properly *littus maris*, sometimes called *marethum*, sometimes *warethum*. And touching this kind of shore, viz., that which is covered by the ordinary flux of the sea, is the business of our present inquiry.

1st. This may belong to a subject. The statute of 7 Jac. cap. 18, supposeth it, for it provides that those of Cornwall and Devon may fetch sea-sand for the bettering of their lands, and shall not be hindered by those that have their lands adjoining to the sea-coasts, which appears by the statute they could not formerly. *Vide Cartæ Antiquæ D. D. n. 24*, the charter of Alan de Percey to the monks of Whitby, and the bounds thereof, viz., *totam marinam à portu de Whitby usque Blowick, etc., et usque Terdiso, et usque in mare, et per marinam in Whitby*, confirmed by King Henry II. And the bound of that abbey's possessions take in many creeks of the sea, yet are given by a subject, viz., Derwent, Muse, Eze, etc.

2d. It may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor. And thus it is agreed. 5 Reports, 107. in Sir Henry Constable's case, and the book of 5 E. 3,

Mather v. Chapman.

3, cited accordingly. And according to this was the resolution cited Dyer, 314, to be between Hammond and Digges, P. 17, *Edm.* Accordingly it was decreed in the Exchequer Chamber, P. 16, *Car. inter* F. Attorney-General et Sir Samuel Roll, Sir Richard Buller and Sir Thomas Arundell, *per omnes barones*. And the evidences to prove this fact are commonly these: constant and usual fetching gravel and sea-weed and sea-sand between the high-water and the low-water mark, and licensing others so to do, inclosing and imbanking against the sea, and enjoyment of what is so inned, enjoyment of wrecks happening upon the sand, presentment and punishment of purprestures these in the court of a manor, and such like.

And as it may be parcel of a manor, so it may be parcel of a vill or parish; and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the parson of Sutton about 14 Car. had a verdict for the tithes of Sutton Marsh in Lincolnshire, upon a long and a great evidence; though it appeared that within time of memory it was the mere shore of the sea covered at ordinary tides, and without the old sea bank.

3d. It may not only be parcel of a manor, but *de facto* it many times is so; and perchance it is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor. For, for the most part, wrecks and royal fish are not, nor indeed cannot be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land; but these are perquisites which happen between the high-water and low-water mark; for the sea withdrawing at the ebb leaves the wrecks upon the shore, and also those greater fish which come under the denomination of royal fish. He therefore that hath wreck of the sea or royal fish by prescription *infra manerium*, it is a great presumption that the shore is part of the manor, as otherwise he could not have them. And consonant to this is the pleading of Sir Henry Nevill's case, 5 E. 3, 3, and Rastall's Entries, 634, transcribed out of the record M. 14, E. 1, Rot. 432, where an abbot, prescribing for wreck belonging to his manor, doth it in this form: *Ipseque et omnes predecessores sui abbates monasterii predicti et domini ejusdem manerii; per totum tempus predictum, habuerunt et habere consueverunt, ratione manerii predicti, omnimodo bona wreckata super mare et ut wreckum super terram projecta per costeram maris in quodam loquo ubi mare secundum cursum suum pro tempore fluxit et refluxit, à quodam loco vocato M. in parochia de L... etc.*; and in the following plea an abbot prescribes to have *wreckum maris infra prædictum manerit sive domini sui projectum et flotisan maris infra prædictum manerit deveniens, quòdque predictum dolum vini fuit wreckum maris per mare projectum super litus maris apud S. infra prædictum manerit sive domini illius*.

And with this agrees the Register, 102. Yet I find the Earl of Cornwall had *wreckum maris per comitatum Cornubiæ*; and thereupon being questioned for wreck, adjudged *quod eat sine die*. P. 14, c. 1, minus B. R. Rot. 6, *Cornubiæ*. But that was in a contest between the king and him; for possibly the inferior lords might have it by usage against the earl.

Thus much shall suffice concerning the shore or space between the high-water and low-water mark, which may belong to a subject and be parcel of his manor.

II Let us now come to the *maritima incrementa*, viz. .

Alluvio maris;
Recessus maris; et
Insula maris.

(1st.) For the *jus alluvionis*, which is in an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees. Bracton, lib. 2, cap. 2, writes thus: *Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum. Et per alluvionem adfluit dicitur, quod ita paulatim adfluitur, quod intelligere non possis quo momento temporis adfluitur, etc. Si autem non sit latens incrementum, contrarium erit, ut vis fluminis partem aliquam ex tuo praedio detrahat, et vicin praedio appulsi, certum est eam tuam permanere, etc.* But Bracton follows the civil law in this and some other following places. And yet, even according to this, the common law doth regularly hold at this day between party and party. But it is doubted in case of an arm of the sea. 22 Ass. 98.

This *jus alluvionis*, as I have before said, is *de jure communi* by the law of England the king's, viz., if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*, as well in maritime increases as in the increases by inland rivers.

But yet custom may in this case give this *jus alluvionis* to the land whereunto it accrues.

This is made out very plainly by these ensuing records:

Communio Trin. 43, E. 3, Rot. 13, in *Soaccarto*, which is that very record which is cited by Dyer, 328, out of the book of Ramsey. Process went out against the abbot of Ramsey *ad ostendendum causam, quare 60 acrae marisci in manum regis non debent sequiri, quia abbas appropriavit sibi et domui suae sine licentia regis, super quadam generali commissione de terris a rege conceleatis et detentis.* Abbas respondit, *quod ipse tenet manerium de Brancaster, quod solitum est juxta mare, et quod est ibidem quidam mariscus, qui aliquando per influxus maris minoratur, aliquando per defluxus maris augetur, absque hoc quod appropriavit sibi prout per praesentationem praedictam supponitur.* And issue joined and verdict given for the abbot by nisi prius before one of the barons. *Et judicatum quod eat sine die salvo semper jure regis.*

Though there were a verdict upon the issue, whether appropriated or not, yet it is plain that the title stood upon that which the abbot alleged by way of increment. And note, here is no custom at all alleged, but it seems he relied upon the common right of his case, as that he suffered the loss so he should enjoy the benefit, even by the bare common law in case of alluvion.

M. 23, E. 3, B. R. Rot. 26, *Lincolnia*. The abbot of Peterborough was questioned at the king's suit for acquiring 30 acras marisci in *Gosberkilla*, *licentia regis non oblenta*. The abbot pleaded, *quod per consuetudinem, trix est et a tempore quo, etc., explicit usurpatum quod omnes et singuli, domini, maneria terras seu tenementa supercoasteram maris habentes, particulariter habebunt marettum et sabulonem per fluxus et refluxus maris secundum majus et minus prope tenementa sua projecta. Et dicit, quod ipse habet quoddam manerium in eadem villa, unde plures terras sunt adjacentes costerae maris, et sic habet per fluxus et refluxus maris circiter 300 acras maris terras suas adjacentes, et per temporis incrementum secundum patriae consuetudinem; et absque hoc quod ipse perquisivit, etc.* And upon issue joined it depended many years before the issue was tried. But afterward, P. 41, E. 3, B. R. Rot. 28 *Lincolnia*, Rex, viz., given, *quod secundum consuetudinem patriae, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costerae maris adjacentes projecta, etc. Ideo abbas sine die.*

Mather v. Chapman.

Observe,

1st. Here is custom laid, and he relies not barely upon the case without it.

2d. In this case it was *per incrementum temporis* and *per mare projecta*. It is not a sudden reliction or *recessus maris*, as I shall have occasion to mention hereafter; and though there is no *alluvio* without some kind of reliction, for the sea shuts out itself, yet the denomination is taken from that which predominates. It is an acquiescent *per projectionem* or *alluvionem*, not *per recessum* or *relictionem*.

3d. That such an acquisition lies in custom and prescription; and it hath a reasonable intendment, because these secret and gradual increases of the land adjoining *cedunt solo tanquam majus principali*; and so by custom it becomes as a perquisite to the land, as it doth in all cases of this nature by the civil law.

(2d.) Now as touching the accession of land *per recessum maris*, or a sudden retreat of the sea, such there have been in many ages. Sometimes the ocean, especially the narrow sea lying between us and France and the Netherlands, leaves the English shore in a great considerable measure — possibly by reason of some superundation on the other eastern shore, or by some other reason we know not.

This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of *alluvio*, or increase *per projectionem*; and, therefore, if an information be laid for so much land relict *per mare*, it is no good defense against the king to make title *per consuetudinem patriæ* to the *marettum*, or *sabulonem per mare projectum*; for it is an acquiescent of another nature. And this was accordingly adjudged, *H. 12, Car. Rot. 48*, in the case of the king against Oldsworth and others for Sutton Marsh, in *Soaccario*. And in that case it was likewise held and adjudged, that lands acquired *per relictionem maris* are not prescribable, as part of a manor or as belonging to the subject; for that were to prescribe, in-effect, that the narrow seas to the coasts of France or Denmark were part of a manor. In that case the information plea and judgment were in substance as followeth, viz.: *Quod cum 7000 acrae marisci salis vocati Sutton Marsh, facientes et existentes juxta Sutton Long in comitatu predicto, videlicet, inter Sutton Long et mare ad refluxum ejusdem, fuissent parcella litoris marini, ac ad refluxum maris naturalis et ordinarios aquas salis et marinis inundata; cumque eadem 7000 acra marisci salis nuper à mari, unde inundata fuissent, fuissent relictæ.* Then the information sets forth a grant by king James under the great seal to Peter Ashton and others, and a regrant by them by deed inrolled to the king, and that Michael Oldsworth, etc., intruded. The defendant Oldsworth came in, and as to part pleaded as tenant, viz.: *Quod bene et verum est, quod predictæ 7000 acrae marisci salis vocati Sutton Marsh, facientes et existentes juxta Sutton Long, viz.: inter Sutton Long et mare ad refluxum ejusdem, fuerunt parcella litoris marini, et ad refluxum maris naturales et ordinarios aquas salis inundata et a mari relictæ prout per informationem.* But he further saith, the king was seized in right of the duchy of the manor of Sutton, *et quod plures terræ dicti manerit ante relictionem dictæ costerae maris adiacebant; et quod consentudo patriæ est et à tempore quo, etc., quod domini maneritorum, terrarum, seu tenementorum super costeram maris adjacentium, particulariter habebunt marettum et sabulonem per fluxum et refluxum maris secundum majus et minus prope terras seu tenementa sua projectum sive relictum: quodque et predicta 7000 acra marisci salis ad terram predictam parcellam manerit de Sutton adjacent, et per fluxum et refluxum maris relictæ fuerunt à mari, et projectæ ad terram predictam parcellam manerit de Sutton predicti ratione cujus relictionis predictæ domini res fuit relictis, etc., de prædictis*

Mather v. Chapman.

7000 *acris in jure duatus, etc.* And then he entitles himself by a grant under the duchy seal, and traverseth what he had not confessed. Upon this there was a demurrer and judgment for the king, upon solemn argument; and principally upon this reason, that custom cannot entitle the subject to relict lands, or make it part of a manor; and it differed from the case of the abbot of Petersborough before cited; for there it was only *project*, but here *relict* is added to the plea, that it might answer the information; though the plea in the abbot of Peterborough's case was the precedent by which the plea was drawn, and with which it agreed, saving that addition of *relict*.

And yet the true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the king's it cannot become the subject's because the water has left it. But in the case of *alluvio maris*, it is otherwise, because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land, and, therefore, in case of private rivers, it seems by the very course of the common law, such a gradual increase *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi* in case of the king, yet doubtless it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquet *per alluvionem* there be a reliction or rather exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.

But this is to be carried along with us in the case of *recessus* or *relictio maris vel brachii ejusdem*; that where the land, as it stood covered with water, did by particular usage or prescription belong to a subject, there the *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris vel brachii ejusdem* belongs to the same subject.

The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent seas to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea; but a subject hath not nor indeed cannot have that property in the sea, though a whole tract of it that the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz., of a *districtus maris*, a place in the sea between such points, or a particular part contiguous to the shore, or of a port or creek or arm of the sea. These may be possessed by a subject, and prescribed in point of interest both of the water and the soil itself covered with the water within such a precinct; for these are maniorable, and may be entirely possessed by a subject.

The civilians tell us truly, *nihil præscribitur nisi quod possidetur*. The king may prescribe the propriety of the narrow seas, because he may possess them by his navies and power. A subject cannot. But a subject may possess a navigable river, or creek or arm of the sea, because these may lie within the extent of his possession and acquet.

The consequence of this is that the soil relinquished by such arms of the sea, ports or creeks, nay, though they should be wholly dried or stopped up, yet such soil would belong to the owner or proprietor of that arm of the sea, or river, or creek; for here is not any new acquet by the reliction, but the soil covered with water was the subject's before, and also the water itself that covered it, and it is so now that it is dried up or hath relinquished his channel or part of it.

And such an acquet of a propriety in an arm or creek of the sea may be as

Mather v. Chapman.

well within the precinct of a port as without, and that, though the king or some other subject hath the port in point of franchise or privilege. For though the soil of all creeks and navigable rivers, especially within ports, do *prima facie* belong to the king in point of propriety as well as in point of franchise, yet the subject may have so great and clear a possession of the soil lying under the water of that port that it may belong to a subject in point of interest or propriety of the soil, though he have or have not the port in point of franchise; and consequently if the sea should relinquish the channel or creek or arm of the sea within such a port it might and would belong to that subject that had the propriety of the soil and waters before it were so relictod.

And this is an exception out of that generality, possibly that *terra relictas per mare* may not be prescribed. But a certain creek, arm of the sea or *districtus maris* may be prescribed in point of interest, and by way of consequence or concomitance the land relictod there, according to the extent of such of a precinct as was so prescribed, will belong to the former owner of such *districtus maris*. But otherwise it would be if such prescription before the reliction extended only to a liberty, or *profit d prendre*, or jurisdiction only within that precinct, as liberty of free fishing, admiral jurisdiction, or the jurisdiction of a leet or hundred or other court; for such may extend to an arm of the sea, as appears by 8 E. 2, *Corone*; for these are not any acquiescence of the interest of the water and soil, but leave it as it found it.

Therefore the discovery of the extent of the prescription or usage, whether it extend to the soil or not, rests upon such evidences of fact as may justly satisfy the court and jury concerning the interest of the soil.

That which I have to say concerning creeks or havens or arms of the sea, and the propriety of them, will be contained in the following assertions.

1st. That a subject may, by usage or prescription, be owner or proprietor of such an arm of the sea, creek or particular portion of the sea contiguous to the shore, as is not a public port or haven; and consequently, if that part be left dry *per recessum vel obstructionem maris*, that will belong to that subject that had that antecedent propriety when it was covered with water.

This will appear by the review of those cases that are in the precedent chapter concerning the right of fishing in the sea, many of which instances make it appear that there may be a right of propriety in the soil *aquæ coopertâ*, and the right of fishing resulting not as a *profit d prendre*, but upon the very right of the soil itself. And those instances that follow in the chapter will farther make out the propriety of the soil of such places as these compatible to a subject.

2d. That a subject having a port of the sea may have, and indeed in common experience and presumption, hath the very soil covered with the water; for though it is true, the franchise of a port is a different thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in ordinary use and presumption they go together.

If the king at this day grant *portum maris de S.*, the king having the port in point of interest as well as in point of franchise, it may be doubtful whether at this day it carries the soil, or only the franchise; because it is not to be taken by implication. But, surely, if it were an ancient grant, and usage had gone along with it, that the grantee held also the soil, this grant might be effectual to pass both, for both are included in it.

And so if by prescription or custom a man hath *portum maris de S.* in ordinary presumption he hath not only the franchise, but the very water and soil within the port; for a *portus maris* is *quid aggregatum*, as a manor; and such

Mather v. Chapman.

a prescription may carry the soil as well as the franchise; and though this doth not always hold, yet most times it doth.

Escotria 12, E. 1, n. 1. Portus et piscaria et mariscus de Topeham spectant ad Amictiam comitissam Devon. She had not only the franchise of the port, but the soil of the port, and the fishing and salt-marsh adjoining. *Vide infra.* where we come to the right of ports.

And *Vide infra*, par 2, cap. 4, the case of the port of Plymouth, parcel of the manor of Trematen, wherein it will appear that a subject, as he may be owner of a port in point of franchise, so he may be owner of the very soil of the haven in point of propriety. And see in the same chapter concerning the port of Poole. The Earl of Surrey was owner of it in point of propriety as well as franchise, and had the anchorage of ships there, which seems to be ordinarily a prerequisite in respect to the soil.

3d. That a man who is not owner of a port in point of franchise, but the franchise of the port belonging to the king, yet such a subject may by usage have the very propriety of a creek or arm of the sea, parcel of that port, and of the soil thereof; and may have upon that account the increases of land that happen by the recess of the water of that arm of the sea.

Register, 252 The prior of Christ Church *Canthuaris* petitions the king, *quod cum quadam antiqua trenchea, quae se duoit à brachio maris vocata A. versus villiam de B. quae est in solo ipsorum prioris et conventus, per sabulones et arenam maris jam de novo taliter sit obstructa, quod naves per trencheam illam usque ad dictam villiam de B. venire nequeunt et solebant; et quadam alia trenchea, ducons ab eodem brachio maris usque ad eandem villiam de B. jam et maritimâ facta existet, per quam naves et batelli à mari usque ad villiam illam commodè et sine impediment poterunt transire. An ad quod damnum issues to inquire, si sit ad damnum vel præjudicium nostri aut aliorum, seu nocuumtum dictae villae de B. et eis licentiam concedamus, quod ipsi dictam antiquam trencheam omnino obstruere et commodum suum inde facere possint.*

Here the common passage for snips to a town admitted in point of propriety to belong to the prior, and that they may make profit of the soil being stopt up.

In Scaccario Car. — upon the prosecution of Sir Sackville Crow, there was in information against Mr. John Smith, farmer, of the Lord Barclay, setting forth that the river of Severn was an arm of the sea, flowing and reflowing with salt water, and was part of the ports of Gloucester and Bristol, and that the river had left about 800 acres of ground near Shinberdge, and therefore they belonged to the king by his prerogative.

Upon not guilty pleaded, the tryall was at the exchequer bar, by a very substantial jury of gentry and others of great value.

Upon the evidence it did appear by unquestionable proof that Severn in the place in question was an arm of the sea, flowed and reflowed with salt water, was within and part of the ports of Bristol and Gloucester, and that within time of memory these were lands newly gained and inned from the Severn; and that the very channel of the river did within time of memory run in that very place where the land in question lies; and that the Severn had deserted it, and the channel did then run above a mile toward the west.

On the other side, the defendant claiming under the title of the Lord Barclay alledged these matters, whereupon to ground his defense, viz. .

1st. That the barons of Barclay were from the time of Henry the Second owners of the great manor of Barclay.

2d. That the river of the Severn *usque flum aquae* was time out of memory parcel of that manor.

Mather v. Chapman.

3d. That by the constant custom of that country, the *flum aquæ* of the river of Severn was the common boundary of the manors on either side of the river.

When this statute of the evidence was opened, it was insisted upon that the river in question was an arm of the sea, a royal river, and a member of the king's port, and therefore lay not in prescription to be part of a manor. But the court overruled that exception, and admitted that even such a river, though it be the king's in point of interest *primâ facie*, yet it may be by prescription and usage time out of mind parcel of a manor.

Thereupon the defendant went to his proofs, and insisted upon very many badges of property or ownership, as namely:

That the lords of the manors adjacent to this river, and particularly those of that manor, had all royal fish taken within the river opposite to their manor *æque flum aquæ*;

That they had the sole right of salmon fishing;

That they had all wrecks cast between high-water and low-water mark;

That the lords of the manors adjacent had ancient rocks or fishing-places, and weares, or such as were of that nature, within the very channel;

That they had from time to time granted these fishing-places, some by lease, some by copy of court roll at their several manors, by the names of rocks, weares, staches, boraches, putts; and that they were constantly enjoyed, and rent paid by those copy-holders and lease-holders;

That by common tradition and reputation the manors on either side Severn were bounded one against another by the *flum aquæ*, and divers ancient depositions produced, wherein it was accordingly sworn by very many ancient witnesses;

That the increases happening by the reliction of the river were constantly enjoyed by the lords adjacent.

These and many other badges were opened, and were most effectually made good by most authentic evidences and witnesses. But before the defendant had gone through one-half of his evidence the court and the king's attorney-general, Sir John Banks, and the rest of the king's counsel were so well satisfied with the defendant's title that they moved the defendant to consent to withdraw a juror, which, though he were very unwilling, yet at the earnest desire of the court and the king's counsel he did agree thereunto.

So that matter rested in peace, and the lands, being of the yearly value of two hundred pounds and better, are enjoyed by the Lord Barclay and his farmers quietly and without the least pretense of question to this day. This I know, for I was thoroughly acquainted with this case, and attended at the bar at the tryall.

This great and solemn tryall for the right of a royal river in a port and part of it doth fully prove that which I have to say touching this matter.

But though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz.:

1st. That the king hath yet a right of empire or government over it in reference to the safety of the kingdom and to his customs, it being a member of a port, *prout inferius dicitur*.

2d. That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, as shall be shown when we come to consider of ports. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects, as the soil of an highway is, which, though in point of property, it may be a private man's freehold, yet it

is charged with a public interest of the people, which may not be prejudiced or damnified.

3d. As touching islands arising in the sea, or in the arms or creeks or havens thereof, the same rule holds which is before observed touching acquets by the relation or recess of the sea, or such arms or creeks thereof. Of common right and *primæ factæ*, it is true, they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extents of such propriety. And therefore if the west side of such an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of the *flum aquæ* invironed with the water, the propriety of such island will entirely belong to the lord of that manor of the west side; and if the east side of such an arm of the sea belong to a manor of the east side *usque flum aquæ* and an island happen between the east side of the river and the *flum aquæ*, it will belong to the lord on the east side; and if the *flum aquæ* divide itself, and one part take the east and the other the west and leave an island in the middle between both the *fla*, the one half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea by a new recess from his ancient channel encompass the land of another man, his propriety continues unaltered. And with these diversities agrees the law at this day. and Bracton, *lib. 2, cap. 2*, and the very texts of the civil law. *Vide Digest, lib. 41, de acquirendo rerum dominio, legibus 7, 12, 21, 29, 30, 33, 50, 54, 65, et ibidem, lib. 43, tit. 12, de fluminibus, l. 1, § 6. Vide Bracton ubi supra. Habet etiam locum hæc species accessions in insula nati in flumine, quæ, si mediam partem fluminis teneat, communis eorum est, qui pro indiviso ab utraque parte fluminis prope ripam prædia possident, &c.* For the propriety of such a new accrued island follows the propriety of the soil before it came to be produced.

And thus much shall suffice to have been said concerning these *incrementa maritima*, and how they may in point of propriety belong to a subject. It remains that a few words be said touching some other prerogatives that have a cognation with this matter we are about, viz.:

Wreck of the sea; and
Royal Fishes;

Which shall be the business of the next chapter.

Minor v. Rogers.

MINOR V. ROGERS.

(49 Conn. 512.)

Gift — when complete — deposit in savings bank — declaration of intention.

A wealthy and childless widow deposited in a savings bank \$250 in her own name as trustee for W., the child of a neighbor and friend. Soon after she told his parents that she had deposited such sum for their son, and afterward spoke of it as belonging to him. She afterward drew out the money at different times, and applied it to her own use; and died leaving a will in which no mention was made of the deposit or of W. *Held*, that the deposit was a complete gift; that the depositor could not revoke it, and that her executor was liable to W. for the amount.

ASSUMPSIT by William A. Minor against Ely F. Rogers, executor, for money had and received. The court found the following facts:

For sixteen years prior to her death, which occurred in the year 1868, Mary Daniels lived as a near neighbor to the plaintiff's father, in the town of Branford. She was a widow, having a large estate and no children, and left property to the amount of about \$35,000. She was intimate with and friendly to the family of the plaintiff's father, and was in the habit of employing the plaintiff to run of errands, and often took him with her when she rode out. He was at her house almost daily, doing errands for her, and she made him several presents of clothing, jewelry, etc.

On the 30th day of March, 1861, the plaintiff came with her to New Haven. She inquired of him particularly about his middle name, and leaving him in a store with directions to wait for her, she visited the New Haven Savings Bank (where, at that time and for a year or two after, she had no deposit except the one now to be mentioned), and deposited in the bank \$250, receiving the usual bank deposit book, made out to "Mary Daniels as trustee of William A. Minor."

The semi-annual interest was afterward added upon the book up to January, 1863, and again up to January, 1864.

On the 15th of June, 1863, she drew out \$150 of the money, and on the 18th of May, 1864, she drew \$130.15, the balance of principal and interest then due, and signed a receipt in the book in her

tially so declared to the bank when she made the deposit, expecting they would make a record of it for the benefit of the plaintiff, which they did make. She substantially so declared to the father and natural guardian of the plaintiff, a short time after, expecting, no doubt, that he would inform the plaintiff of what she had done for him.

It is true that a mere naked promise to give personal property, or a declaration by a party that he gives such property, without performing some act delivering or conveying the property to the donee, would not be sufficient. But here the donor took the sum of money, and deposited it in the bank, where she had no funds of her own, for the purpose of transferring all the beneficial interest in the same to the plaintiff; and although she used her own name as trustee of the plaintiff, still the act had the same effect as depositing it in the plaintiff's name, in every respect except the legal title. Surely here are acts done for the purpose of transferring the beneficial interest in the chose in action to the plaintiff.

If the deposit had been made in the name of the donor alone, then it would have been necessary, in order to perfect the gift, for her to have given the plaintiff a writing conveying the gift, or an assignment of the bank book on which the deposit was entered, as in the case of *Camp's Appeal from Probate*, 36 Conn. 88; S. O., 4 Am. Rep. 39.

But here the conveyance was made of the chose in action at the time the deposit was made, and it so appears on the books of the bank, and on the donor's bank book, which entries she caused to be made at the time of the transaction.

But the defendant relies very much upon the fact that Mrs. Daniels retained possession of the bank book. He considers this act of hers as wholly inconsistent with a perfected gift. But she could not act as trustee of the chose in action without retaining possession of the book, for it is well known that savings banks require the presentation of such books whenever any action on their part is asked for with regard to the deposits in the banks. She retained possession, therefore, because the deposit was made in her name as trustee, and not because she had not given the beneficial interest of the deposit to the plaintiff.

The view we have taken of this case is supported by the case of *Gardner v. Merritt*, 32 Md. 78; S. O., 3 Am. Rep. 115. In that case a grandmother, from time to time during a period of five

Minor v. Rogers.

years, deposited various sums of money in a savings bank in Baltimore to the credit of her five grandchildren. The accounts in the bank were entered in the name of each child as a minor, and the deposits were made subject to the order of the grandmother or that of her daughter. The grandmother died, and shortly after her death the daughter, who was the executrix of her mother's will, obtained from the bank all the money that had been deposited to the credit of the grandchildren, and treated it as a part of the grandmother's estate. It was held that the moneys deposited by the grandmother became perfected gifts in the grandchildren, and that the donees were entitled to the several amounts which stood to their credit in the bank when they were withdrawn by the defendant.

The case of *Millspaugh v. Putnam*, 16 Abbott's Pr. 380, is directly in point. There *C. F.* deposited money in a bank in her own name, and to her own credit, but in trust for *C. F. M.* It was held that this fact raised a presumption that the money deposited was the money of *C. F. M.* and might be so regarded. But even as a gift from *C. F.* to *C. F. M.* the court held the transaction to be sufficiently definite and complete to make the gift absolute and perfect in *C. F. M.* See also the following cases: *Grangiac v. Arden*, 10 Johns. 293; *Grover v. Grover*, 24 Pick. 261; *Howard v. Windham County Savings Bank*, 40 Vt. 597; *Penfield v. Thayer*, 2 E. D. Smith, 305; *Parish v. Stone*, 14 Pick. 198; *Champney v. Blanchard*, 39 N. Y. 111.

We think, therefore, that the gift of Mrs. Daniels to the plaintiff was complete when the money was deposited in the bank, and that consequently she could not thereafter annul the transaction, as she attempted to do.

The defendant further claims that her trust was void for uncertainty, because no time is specified when the plaintiff should enjoy the legal as well as the equitable right to the property. The donor stated that the plaintiff would need the donation for his education, thereby implying that it should be in his hands for that purpose when that time should arrive. At all events it cannot be considered that she intended the trusteeship to continue longer than during the minority of the plaintiff. We see no difficulty in this objection.

Again, it is claimed that the plaintiff cannot maintain this action at law, on the ground that the legal title to the chose in action never vested in him. It will be observed that some three years

Monson v. Drakeley.

after the gift was made, Mrs. Daniels refused longer to act as his trustee, and thereupon converted his property to her own use. It may well be questioned whether the legal title to the chose in action did not instantly vest in the plaintiff by this wrongful act of hers, inasmuch as no particular formality is necessary to transfer the legal title of such property to one in whom the beneficial interest is already vested. But however this may be, we are satisfied that the legal title vested in the plaintiff when he arrived at majority, for we have seen that the trusteeship was never designed to continue longer than during the plaintiff's minority. When that ended, the trusteeship terminated by its own limitation. There was no necessity for its longer continuance. The cases of *Underhill v. Morgan*, 33 Conn. 105, and *Camp's Appeal from Probate*, 36 id. 88; S. C., 4 Am. Rep. 39, have some bearing upon this point.

A majority of the court advise judgment for the plaintiff.

In this opinion SEYMOUR, C. J., and FOSTER, J., concurred. CARPENTER and PHILPS, JJ., dissented.

MONSON V. DRAKELEY.

(40 Conn. 522.)

Promissory note — joint and several — surety — party adding name after inception — contribution.

A promissory note written "I promise," etc., and signed by several persons as makers, is joint as well as several.*

A promissory note, due on demand, was executed by the maker and two sureties and delivered to the payee. Afterward the payee, becoming dissatisfied with the responsibility of the names attached, required the maker to furnish additional security. Thereupon the defendant, at the maker's request, signed the note under the signatures of the sureties and took from the maker collateral security for his risk. The plaintiff, one of the sureties, was compelled to pay the note and brought action against the defendant for contribution. *Held*, that the presumption was that defendant signed the note as surety and not as guarantor, and was therefore liable to contribute.

* To same effect, *Wallace v. Jewell*, 8 Am. Rep. 48.

Monson v. Drakeley.

SUBMISSION upon an agreed statement of facts, the substance of which is set forth in the opinion.

Webster & Watrous, for plaintiff.

Cothron, for defendant.

PHILIPS, J. This case comes before us by way of an amicable suit reserved by the Superior Court at the request of the parties for the advice of this court, on the question whether the defendant, whose name is last signed to the note, is co-surety, with two others, of the principal, so as to be liable to contribute to one of them who has paid the whole debt. It appears from the agreed facts that the loan was made to and for the sole benefit of George A. Monson, and that the creditor at the time the loan was made required the signature of Frank S. Monson and Stiles F. Monson to the note, and that they all signed it upon its face and before its delivery to the payee, and so far as appears from the paper itself intended to be, and were, joint and several makers of it. The payee nine months afterward became dissatisfied with the responsibility of the names then attached to the note, and required the principal to furnish additional security either by mortgage or the name of some other responsible party; whereupon the defendant, at the request of the principal, placed his name upon it under the others, and took from him mortgage security on property belonging to his wife. After the defendant's signature the note read as follows:

“WOODBURY, *March 17th*, 1868.

“For value received I promise to pay Daniel S. Lemmon sixteen hundred dollars, with interest at six per cent and all taxes.

“GEORGE A. MONSON.

“FRANK S. MONSON.

“STILES F. MONSON.

“ROBERT I. DRAKELEY.”

Stiles F. Monson has since been compelled to pay the note, and he now claims that the defendant should contribute toward the amount so paid.

The case might have been so presented as in all respects to entitle the plaintiff to the benefit of every equitable consideration,

but as the record stands we are simply requested to advise whether the defendant is bound to contribute one-third of the sum actually paid in discharge of the note by Stiles F. Monson; and no claim is made or advice asked with reference to the liability of the defendant to transfer, for the benefit of other parties, the security which he holds, or, in consequence of the insolvency or removal of either of them from the State, to establish a different and more equitable basis of apportionment.

An inspection of the paper discloses nothing inconsistent with the fact that the signatures were all written at the same time, upon the same consideration, and for the same purpose. Although the promise is expressed by the use of the singular pronoun "I," the intention of all the signers to become joint and several original makers is uncontradicted by any thing on the face of the note, and such is the legal interpretation of such a promise signed at the same time by several, when the character and object of their signatures is unexplained. *Hemmenway v. Stowe*, 7 Mass. 58; *Chaffee v. Jones*, 19 Pick. 263; Story on Prom. Notes, § 466; see also *Wallace v. Jewell*, 21 Ohio St. 163; 8 Am. Rep. 48. The record, however, farther shows that as between themselves George A. Monson was in fact principal, and Frank S. Monson and Stiles F. Monson only sureties.

What is the legal effect of the defendant's signature? Did he thereby become a joint and several maker with the other parties to the note, or a surety with Frank S. Monson and Stiles F. Monson of George A. Monson, the principal and real maker, or a guarantor of the maker, or a surety for all the preceding signers of the note?

The answer to this four-fold inquiry must very materially depend on the intention of the defendant to be gathered from his signature and from the attending circumstances. A party is at liberty to qualify his signature by the addition of such technical or other words as are apt and effectual to indicate his intention and describe his true character and relationship to the transaction. If he does so his obligation is measured by the words so used according to their legal import, and he is not bound beyond the liability which attaches to a signature so made. He may thus make himself a guarantor or special surety for some particular party as he pleases, or an original principal, provided he becomes a party to the paper at the time of its inception. But if he signs without qualification

or addition, he is presumed to intend what the law, under the circumstances, implies from such a signature.

A party cannot subsequently to the execution and delivery of a note, unless in pursuance of an arrangement at the time of the execution or delivery, become a joint promisor and maker of it. The original consideration is past and executed, and with respect to that he is a stranger, and no new and independent consideration can then be imported into the original contract so as to give the payee the right of recovery against him as a joint maker. The original contract is complete, and the note can in no sense be considered an *inchoate*, but must be regarded as a *perfected* instrument, and therefore cannot be said to be *subsequently made* by the addition of another signature. Such subsequent undertaking is independent of, and collateral to, the original, and must be construed to be either a contract of guaranty or suretyship, according to the consideration and circumstances. *Miller v. Gaston*, 2 Hill, 191; *McCaughy v. Smith*, 27 N. Y. 41; *Tenney v. Prince*, 4 Pick. 385; *Union Bank v. Braintree*, 8 Metc. 509, 510; *Bentham v. Judkins*, 13 id. 265; *McConey v. Stanley*, 8 Cush. 85; *Stone v. White*, 8 Gray, 593; *Green v. Shepard*, 5 Allen, 590; Story on Prom. Notes, § 474, and notes.

Upon the precise question before us we have no case in point in our own decisions, and have looked in vain for any elsewhere in all respects exactly analogous. The general principle, that the right of mutual contribution exists only among those who are sureties for the same thing and bound for the same debt or duty, is fully recognized; and in determining the question of co-suretyship, equity has respect to substance rather than form, and to the engagements which the parties have entered into more than to the instruments by which their engagements are evidenced. If several persons or sets of persons enter into contracts of suretyship which are the same in their legal operation and character, though by different instruments, at different times, and without the knowledge of each other, they will be bound to mutual contribution. 1 Leading Cases in Equity, 156, and cases there cited.

So far as mutuality in contribution in fact exists, it does not depend on the relation of joint makers of an obligation, but entirely on that of co-suretyship. The signature of a surety is not joint in its character, but several, and co-sureties may sign the paper at different times, and indeed different papers, and in ignorance of the

undertakings of each other, and still preserve their mutuality with respect to contribution. A party may be so situated as not to be liable to the holder as a maker, and therefore not in condition to seek contribution from other parties who are sureties, and still retain to them such a relation that in the event of payment by one of them he will be liable to contribute. We think we have shown that a person may sign an obligation after its original execution and delivery and not thereby render himself liable to the payee as a joint maker, yet if he intends to become a co-surety with others, who, as to the payee, are joint and several makers, and as to each other co-sureties, he will be liable to contribution; and we think that is the precise situation of the defendant, if he is liable at all.

With respect to the technical distinctions in legal character and effect between a surety, guarantor, indorser and maker of promissory notes there is so much nicety of refinement as often to lead to great uncertainty as to the real nature of the distinctions, and especially as to the principle on which some of the assumed distinctions rest. In many cases the shades of legal difference between a guarantor and surety are so subtle and readily blended as to be almost impossible of separate and satisfactory discrimination, and sometimes also between an indorser, guarantor and surety; and in some instances the question whether a party was maker, guarantor or surety has been found not free from difficulty upon any clearly defined and well-settled principles.

The practical difficulty mainly arises in attempting to determine the real character of the parties, but when that is clearly ascertained their proper legal rights and obligations can generally be readily affixed. A guarantor of the ability of the maker is in no sense in privity with the sureties. His undertaking is collateral to theirs and independent of it. He is not chargeable by them with contribution, neither can he claim it from them; and if he pays the debt his remedy is that of indemnity against the principal by whose default he has been injured. A supplemental surety for all the prior parties, including the principal as well as sureties, has entered into a still different engagement. His liability is to the holder in case of the default of all those parties. Like a guarantor he is not liable to contribute to the other sureties because his engagement extends to their responsibility as well as to that of the maker. As between himself and the other sureties there is no mutuality, and if he is subjected his only remedy is indemnity. A co-surety un-

Monson v. Drakeley.

dertakes with another to be responsible for the debt or duty of a third person. Their obligation though several is not collateral, but is for the same thing. While they have also a right of indemnity against their principal in case they are damnified, there is generally such mutuality between them as to render the right and duty of contribution reciprocal.

The defendant signed the note for and at the request of the principal, and for his sole benefit, without arrangement with and concurrence of the sureties, and, so far as appears, without their solicitation or knowledge. He supposed it would operate to continue the term of credit of the principal as it in fact did, and was thereby beneficial to him. Under those circumstances he can hardly be said to have signed for the benefit of all the prior parties. His security came from the principal, and the consideration arising out of it moved entirely from him and not from the payee. The payee required of the principal some kind of additional security, and that requirement resulted in the defendant's signature. There was no arrangement whatever between the payee and the defendant. The payee did not agree to forbear suit against the principal, and was under no legal obligation to have done so. Possibly the fact that he did may have been sufficient, in connection with the circumstances, to constitute a valid consideration for the defendant's undertaking, so as to enable the payee to have maintained an action on that undertaking, even though it was only operative to the payee through the medium of the principal; but it is obvious that he could not have done so by simply declaring against the defendant as a joint maker of the note. But even if the defendant's signature was in no way available to the payee, it was so only through his own negligence. He might have required a different kind of security, or a different undertaking. If he was willing to rely on this, and delay the collection of the note, it was not the defendant's fault, nor the result of any contract between the payee and himself; and upon the facts as conceded to exist, we see no reason to attribute to the defendant an intention to contract for the benefit of any one but the principal maker of the note.

This conclusion narrows the case to the inquiry whether the defendant was a guarantor of the ability of the maker upon an undertaking collateral to that of Frank S. Monson and Stiles F. Monson, or whether his engagement was in substance identical with theirs. It is clear that it was with and to the same party, and the

fact that he took security from that party is perhaps as consistent with one relation as the other.

There are undoubtedly authorities which favor our holding the defendant to the character of a guarantor, in which event he would not be liable to contribution; but the special circumstances of the case as evincive of intention should receive their proper weight, and the law must be applied in view of them. We are unable to see our way to a result as clearly as we could wish, because those circumstances are not of absolutely controlling force, and we are left to choose between presumptions of which neither is necessarily conclusive. We consider it of some importance to observe that the defendant is a near connection of the principal and his sureties; and when he signed the note and took security from one of them we think he may be taken to have been conversant with their relation to the paper and to each other with respect to it, and in the absence of all farther explanation, that we may under the circumstances hold the law to presume that, by placing his name under those of the other sureties, and attaching to it no legal character or qualification, he intended to do precisely what they had previously done; and that if the contract of the defendant was reduced to writing it would show a promise by him to George A. Monson, in consideration of the security given, to become a surety for him with Frank S. Monson and Stiles F. Monson in his obligation as the maker of the note. We believe the preponderance of facts and of legal presumptions as applicable to them, to lie in that direction, and in view of the circumstance of the defendant's holding security from the principal we are satisfied that we shall on the whole by this result better subserve the purposes of natural justice and equality in equity, which are said to be the foundation on which the principle of contribution rests.

We have gone thus fully into the questions involved because of their importance, and of the peculiarity of some of the features of the case, and append the following list of the principal authorities considered in our examination of it: *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Craythorne v. Swinburne*, 14 Vesey, 163; *Cooper v. Twynam*, 1 Turn. & Russ. 426; *Breckenridge v. Taylor*, 5 Dana, 110; *McNiel v. Sanford*, 3 B. Monr. 11; *Stout v. Vance*, 1 Rob. (Va.) 169; *Harrison v. Lane*, 5 Leigh, 414; *Daniel v. McRae*, 2 Hawks, 590; *Thompson v. Sanders*, 4 Dev. & Bat. 404; *Bell v. Jasper*, 2 Ired. Eq. 597; *Outler v. Emory*, 37 N. H. 567; *White-*

Monson v. Drakeley.

house v. Hanson, 42 id. 9; *Lapham v. Barnes*, 2 Vt. 213; *Langley v. Griggs*, 10 Pick. 121, *Chaffee v. Jones*, 19 id. 260; *Warner v. Price*, 3 Wend. 397; *Harris v. Warner*, 13 id. 400; *Norton v. Coons*, 3 Denio, 130; S. C., 2 Seld. 33; *Campbell v. Mesier*, 4 Johns. Ch. 334.

We advise the Superior Court to decree that the defendant is liable to contribute to the plaintiff the sum and proportion claimed by him.

In this opinion **SEYMOUR, C. J., PARK and FOSTER, JJ.**, concurred.

CARPENTER, J. It seems to me that the defendant may more properly be regarded as a guarantor and therefore not liable to contribution; but I am disposed to acquiesce in the result, on the ground that, having signed the note as maker, he *intended* to become liable as such, and that the other parties so understood it. That being so, there is no injustice in holding him responsible on his contract according to the intention of the parties. If he is to be regarded as a maker at all, I think he is a maker for all purposes, and liable, not only to contribution, but also to the holder directly.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

HALE V. EVERETT.

(33 N. H. 9.)

*Religious society — injunction to restrain change of denominational preaching —
“Protestant.”*

Certain persons organized themselves under a general statute into a corporation as a “Unitarian Society of Christians,” and continued to hold property and conduct public worship as such until the pastor publicly avowed that he was “neither a Unitarian nor a Christian.” Thereupon a majority of the members of said society formed a new society and re-employed said pastor. He continued to preach his own doctrines in the meeting-house of the society, and was supported by a majority of the society. The minority filed a bill against the majority and the pastor, praying an injunction to restrain the preaching of such doctrines in the meeting-house. *Held*, that they were entitled to the injunction.

The term “Protestant,” as used in the constitution of New Hampshire, means all Christians who deny the authority of the pope of Rome; it does not include Mahometans, Jews, pagans or infidels.

BILL in equity for an injunction to restrain the defendants, claiming to be members and wardens of “The First Unitarian Society of Christians in Dover” and as members of an independent society, from hiring one Abbott to preach in the meeting-house

of said society, and to enjoin said Abbott from preaching in said meeting-house.

The complainants alleged that they were members of said First Unitarian Society and pew-holders and owners in the meeting-house of said society; that said society was duly formed in 1827 and became a body corporate under the name of "The First Unitarian Society of Christians in Dover;" that a meeting-house was built for the accommodation of the members of said society in their public worship, and formally dedicated to the worship of God by ministers of the Unitarian denomination of Christians; that the object of said society and meeting-house was the inculcation of the Christian religion as cherished by the Unitarians, and that such religion was preached and taught in said society and meeting-house down to March, 1868.

The complainants further alleged that in 1864, Francis E. Abbott, one of the defendants, was ordained and installed over said society as its pastor, and continued so to act until March 31, 1868, when his connection with said society was dissolved by mutual consent; that the said Abbott, before the dissolution of his connection with said society as its pastor, openly and publicly and repeatedly disavowed his belief in doctrines of Christianity as received and taught by said Unitarian denomination; and in the pulpit in said house, on Sunday, the 29th day of March, 1868, in a public discourse by him then and there preached to said society, declared that he was neither a Unitarian nor a Christian; declared his disbelief in the doctrine of the Lordship and Messiahship of Jesus, and that the writings of some men now living are as highly inspired and as sacred as the Bible; and declared the doctrine "that whenever a human soul has uttered its sincere and brave faith in the divine, and thus bequeathed to us the legacy of inspired words, there is the Holy Bible;" that said Abbott has, both before and since said 29th day of March, in his public discourses preached in said Dover, and in articles published by him in divers newspapers and periodicals, proclaimed that Christianity is only one among many religions, and that it is partly true and partly false; that he is neither a Unitarian nor a Christian, but stands outside of Christianity; that he rejects Christianity; "that religion has no more to do with Jesus than it has with Judas;" that "it leaves the soul alone with God;" that "it acknowledges no leader, is loyal to no master, imitates no exemplar, looks to no redeemer, needs no saviour,

knows no Christ ;" that Jesus himself was not a Christian, but a simple theist, and that he, the said Abbott, believes Christianity to be a perversion of theism; and that said Abbott still continues to make these and similar statements as his religious belief ; all of which statements so made by said Abbott, and the doctrines therein contained, the plaintiffs say are wholly different from, and opposed to, and in contradiction of the religious belief of that sect of Christianity called Unitarian, and of Christianity itself.

It was further alleged that the wardens of said society and the other defendants did subsequently take possession of said meeting-house and employ said Abbott to preach therein doctrines not holden or taught by the Unitarians ; and that they claimed to constitute an independent society.

Defendants answered in substance, that it was nowhere indicated in the formation or subsequent proceedings of said First Unitarian Society (unless in the name) that the association was to be Unitarian or sectarian ; that the quotations from said Abbott's sermons and writings, given in the bill, were garbled and deceptive ; that said defendants were Unitarians ; that a majority of the active members of said association sympathised and acted with defendants ; that at the last parish meeting of said parish the following were passed by a majority of all the votes cast :

" Whereas, differences of feeling and sentiment have arisen, and now exist, among the members of the First Unitarian Society of Christians in Dover, so much so that a division of the society seems imminent, now, therefore, for the purpose of conciliating and harmonizing said differences, Resolved, That each of the two divisions of said society be entitled to the use of its meeting-house one-half of the time, alternating each forenoon and afternoon ; and that each division may have the use of it at any time when not used by the other, and in case both divisions should desire to use it the same evening, that division which the last preceding evening had the use of it shall yield to the other ; and that the pew-rents be applied to lighting and heating the house ;" that by virtue thereof defendants had only occupied said meeting-house one-half the time, and that they had not hindered or prevented the plaintiffs from occupying it.

J. G. Hall, for plaintiffs.

S. M. Wheeler, for defendants.

SARGENT, J.* This society in Dover was formed and organized on the 28th day of August, 1827, and has continued to the present time under the same organization. The purpose and design of forming the society are set forth in the articles of agreement, as follows: "Believing that the public worship of God has a salutary influence upon society, by awakening and diffusing moral and religious affections, and considering there are many persons in the place who are unprovided with such means of religious instructions and accommodations for public worship as are most congenial with their own convictions of truth and duty; therefore, the subscribers, for their mutual and better accommodation in the premises, do hereby unite and form themselves into a religious society by the name and style of The First Unitarian Society of Christians in Dover, and do hereby agree to be governed, in their associate capacity, by such rules and by-laws as said society may from time to time establish. Such persons as are desirous of uniting with them may become members of said society by subscribing this agreement."

This discloses a design to form not an agricultural, a mechanical, a philosophical, or a literary organization, but a religious society. Its name was adopted for the double purpose of having a legal style and name by which to act and be recognized in law, and also of indicating and defining the religious opinions and sentiments of its members, of expressing their sectarian and denominational preferences and peculiarities. Every word in the name assumed was not only important as a part of its legal cognomen, but also as expressing some truth which formed an important part in the description of the society, referring either to its location and rank, or to the peculiar religious sentiments of its members. It was the "First" society of its kind, and not the third or the fifth. It was a society "in Dover," not in Exeter or Portsmouth. So it was a "Unitarian," and not a trinitarian society; and it was also a society of "Christians," and not of Jews, Mohammedans, pagans, or infidels.

This society thus constituted, and having voluntarily assumed this name, the leading and most important words in which were, and were designed to be, so expressive of the most fundamental doctrines of the sect of which, and of which alone, its members

* SMITH, J., did not sit.

were to be composed, on the 6th day of November, 1827, met and voted "that, in the views of the society, it is expedient that there should be a house built for the accommodation of its members, in their public worship; that there be a committee formed for raising by subscription the sum of \$10,000. for the purpose of purchasing a lot of land, and thereon building a house for the above purpose; and that that sum be divided into 100 shares of \$100 each;" and a committee was at the same time appointed to superintend said subscription.

The required amount was thus raised by subscription, and a lot of land was bargained for; and during the year 1828 a meeting-house was commenced thereon, said house fronting on Locust street, in said Dover, the land and house all being paid for by the money thus subscribed. After the house was commenced, the land, including the house, was conveyed, by the Dover Manufacturing Company, June 10, 1828, to five persons, H., C., A., P., and O., all of Dover, and their successors, as "trustees of said society," to be held by them "in trust for the use of the stockholders or proprietors of the meeting-house to be erected thereon, their heirs and assigns, and under such regulations, conditions and restrictions, for the sale and occupancy of the pews in said house, and for the use, care, custody and control of said house as may be prescribed by a majority of the votes of said stockholders, at any time previous to the sale or disposal of the pews in said house."

A meeting of said stockholders or subscribers was duly called and holden at said Dover, on the 6th day of March, 1829, prior to the sale of any of the pews in said house; and among other things it was voted, 1st, "That the general custody of said house shall be under the control of The First Unitarian Society of Christians in Dover." Then, after various other regulations, they provided that a pew tax shall be paid on the first day of April annually, "to be appropriated for the support of religious worship in said house, *under the direction of The First Unitarian Society of Christians in Dover,*" and, also, that the pews be sold subject to these conditions.

A public sale of the pews in said house was holden March 17, 1829, when said pews were sold and conveyed, with all the privileges and appurtenances incident to the pews in said house, and subject to all their liabilities, agreeably to the regulations and conditions as adopted by said stockholders for the sale of said pews.

It appears that such vacancies as have occurred in the board of

trustees of said society have been duly filled by new elections, and that Eri Perkins and others are the present trustees, and the proper successors of the original grantees of the land, who now hold it, with the meeting-house thereon, subject to the same trusts as contained in the original deed.

It will be observed that the meeting-house is described in the bill and in the decree as the meeting-house of said society. This is not literally true, but it is apparent what was intended by this expression. The house was not the absolute property of the society. Perhaps the society, properly speaking, had nothing of legal title. It was not conveyed to the society, not to the trustees of the society in trust for the use of the society as such, but to said trustees and their successors in office, "in trust for the use of the stockholders or proprietors of said meeting-house, * * * their heirs and assigns," subject to such regulations, conditions and restrictions "for the occupancy of the pews in said house, and for the use, care, custody and control of said house," as should be prescribed by the stockholders (subscribers) before the sale of the pews; and the conditions prescribed by the stockholders were that "the custody of said house shall be under the control of," and that the annual pew tax is "to be appropriated for the support of religious worship in said house, under the direction of" "The First Unitarian Society of Christians in Dover." While, therefore, the house was not owned by the society, nor held in trust for the use of the society as such, the legal title was held by the trustees of said society, but in trust for the use of the stockholders or proprietors of said meeting-house, but not for their general or unrestricted use. But their use, both in the occupancy of the pews, and in the general use, care and custody of the house, was to be under the absolute and unlimited control of "The First Unitarian Society of Christians in Dover," and the annual pew tax was to be appropriated for the support of religious worship under the same unlimited control of the same society.

It was, therefore, the meeting-house which the society controlled, both in regard to the occupancy of the pews and the general custody and use of the house, and is thus spoken of as the house of the society, though the society did not hold the legal title. No question is raised here in regard to this trust, or in regard to the right of this society to control the house and the use of it in the way specified in the deed, and as regulated and restricted by the subscribers to

the stock before the sale of the pews. This meeting-house was thus held by certain persons, being trustees of the society for the time being *in trust* for the use of certain other persons, said use being always subject to the control and general custody of "The First Unitarian Society of Christians in Dover."

This society was formed under and by virtue of an act of the legislature of this State, entitled "An act empowering religious associations to assume corporate powers." Approved July 3, 1827, N. H. Laws (1830), 462. This was substantially a re-enactment of the act of 1819, 2 N. H. Laws (1824), 44 ; and this act of 1819 was in amendment of the law of 1791, entitled "An act for regulating towns and the choice of town officers," N. H. Laws (1815), 243 ; and this law of 1791 was passed under and in conformity with the provisions in our State constitution of 1783, which provisions remained unchanged in the constitution of 1792, which is still in force.

Let us then examine such parts of our constitution as bear upon this subject, and we shall find it convenient to select and group together several articles of part first of the bill of rights, and also of part second of the constitution, each of which we may need to examine by itself and in connection with the others, as throwing light upon the questions involved in this case.

These articles in the constitution of 1783 were not changed in the revision of 1792, but remain the same in both, and continue unchanged to the present time. They are as follows :

"PART FIRST.

"*Bill of Rights.*

"ART. I. All men are born equally free and independent ; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

"ART. II. All men have certain natural, essential and inherent rights, among which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and, in a word, of seeking and obtaining happiness.

"ART. III. When men enter into a state of society, they surrender up some of their natural rights to that society in order to insure the protection of others ; and without such an equivalent the surrender is void.

"ART. IV. Among the natural rights some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

"ART. V. Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience and reason ; and no subject shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion, provided he doth not disturb the public peace, or disturb others in their religious worship.

"ART. VI. As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection ; and as the knowledge of these is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion ; therefore, to promote these important purposes, the people of this State have a right to empower, and do hereby fully empower the legislature to authorize from time to time the several towns, parishes, bodies corporate or religious societies within this State to make adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality.

"Provided, notwithstanding, That the several towns, parishes, bodies corporate, or religious societies shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance ; and no person of any one particular religious sect or denomination shall ever be compelled to pay toward the support of the teacher or teachers of another persuasion, sect, or denomination.

"And every denomination of Christians, demeaning themselves quietly, and as good subjects of the State, shall be equally under the protection of the law ; and no subordination of any one sect or denomination to another shall ever be established by law."

The other provisions of the constitution, that need to be considered in connection with the above, are the following:

"PART SECOND.

"Form of Government.

"ART. V. And, further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish all manner of wholesome and reason-

able orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as that the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this State, and for the governing and ordering thereof, and of the subjects of the same.

"ART. XIV. Every member of the house of representatives * * * shall be of the Protestant religion, and shall cease to represent such town, parish, or place, immediately on his ceasing to be qualified as aforesaid.

"ART. XXIX. *Provided, nevertheless,* That no person shall be capable of being elected a senator who is not of the Protestant religion * * * .

"ART. XLII. The governor shall be chosen annually, in the month of March * * * . And no person shall be eligible to this office * * * unless he shall be of the Protestant religion.

"ART. LXI. * * * and the qualifications for councillor shall be the same as for senator."

It is sufficiently plain, that, by these last four provisions, a religious test is instituted as a qualification for holding certain civil offices. Every member of the house of representatives "shall be of the Protestant religion." No person shall be capable of being elected a senator or councillor "who is not of the Protestant religion." And no person shall be eligible to the office of governor "unless he shall be of the Protestant religion." Something more is evidently intended by these expressions than that a man should simply not be a Roman Catholic in order to hold these offices. The requirement is not negative, but positive and affirmative. It is not that these offices may be filled with those who are *not* Roman Catholics, or who are *not* pagans, or Jews, or Mohammedans, but only by those who *are* of the Protestant religion. This is so in every case; each provision requires a positive and affirmative qualification in order to hold the office. A Mohammedan is not a Roman Catholic; but he cannot hold these offices, or either of them, because he is not of the Protestant religion, as the law requires he should be. So of the Jew; so of the pagan. The same would be true of an infidel; he is not a Roman Catholic, but he is not of the Protestant religion, because, to be a Protestant he must be a Christian; to be of the Protestant religion, he must be of the Christian religion. The term Christian embraces and includes both Roman Catholic and Protestant alike; and, to be of

Hale v. Everett.

the Catholic or Protestant religion, a person must first be of the Christian religion.

In Robbins' *Religions of All Nations*, page 6, it is said, "The religious world is divided into four grand systems, viz.: Christianity, Judaism, Mohammedanism and paganism. *Christianity* is the religion of those who believe that Jesus Christ is the true Messiah and the Saviour of men, and who receive the Holy Scriptures of the Old and New Testaments as the word of God (p. 11). *Judaism*—of all those who still expect and look for a promised Messiah. *Mohammedanism*—of all those who acknowledge Mohammed a true prophet. *Paganism*—of all those who have not the knowledge of the true God, but worship idols."

The author adds, "The only people who may not be classed under one or the other of these four divisions are the *deists* and the *atheists*, the latter differing from them all, in owning no religion, and the former in owning no divine revelation as the foundation of their religion."

The grand subdivisions among Christians are:

"1. The Greek or Eastern church.

"2. The Roman Catholic, who acknowledge the authority of the pope.

"3. The Protestant or Reformed churches or sects, who reject the authority of the pope." Id. p. 7.

In consequence of the protest against the decree of the Diet of Spires (or Spire or Speiers), holden within and for the empire of Germany, under the Emperor Charles V, in the year 1529, the followers of Luther were denominated Protestants, a general term, which was applied alike to all who adopted the principles of the Reformation in opposition to the Catholic church, and which has continued to the present time. Id. 109, 110. Dowling's *History of Romanism*, 471, and note; 1 Felt's *Ecclesiastical History of New England*, 5, 6; 4 D'Aubigne's *History of the Reformation*, b. 13.

Now the principles of the Reformation, thus adopted by Luther of Saxony and his fellow laborers—among whom were Zwinglius in Switzerland, Melancthon in Germany, Calvin in France, Cranmer in England, and Knox in Scotland, preceded first by the Waldenses among the Alps, and later by Wickliffe of England, and after him by Huss and Jerome of Bohemia—were founded upon the Bible alone, received as the revelation of God's will, and

held to be the supreme and only rule of faith and practice. In this they all agreed, though they differed widely in many of their views of doctrine and of church polity.

These views and principles were incorporated into a general confession by the Diet held at Augsburg in Bavaria, in the year 1530, which has since been known as the "Augsburg Confession." This event marked the culmination of the German reformation; and this confession was for a time the established Protestant creed. 1 Chambers' Encyclopædia, 548, 549; 6 Chambers' Encyclopædia, 222. This confession consisted of two parts — first, the positive or affirmative part, consisting of twenty-one articles, which embraced their views of Christian doctrines as taught in the Bible; while the second part consisted of seven articles, stating the points of difference between themselves and the Roman Catholics. Mosheim, in speaking of the Augsburg Confession, says, "That confession was adopted by the whole body of the Protestants as the rule of their faith." 4 Mosheim's Ecclesiastical History, ch. 3, p. 89. In a note on page 90, it is said that twenty-one chapters were devoted to stating the positive and affirmative principles and opinions which they entertained as Protestants, and only the remaining seven to pointing out the errors of popery. 1 Chambers' Encyclopædia, "Augsburg Confession;" 4 D'Aubigne's History of the Reformation, book 14. From this we learn that it was thus early considered that what they believed was of vastly more consequence than what they did not believe; that it was far more important to be right themselves than to differ from somebody else who was, or was supposed to be, wrong; of far greater moment to be Christians than not to be Romanists. They were all Christians; believers in Christianity first, and secondly, though Christians, they did not admit the authority of the pope of Rome; and though the number of religious sects has since been multiplied, yet the term Protestant has never been applied, and cannot properly be applied, to any but those who are first Christian, and afterwards anti-Catholic.

An infidel — one who does not believe the Bible, or that Jesus Christ was the true Messiah, "the Christ of God" — can no more be a Protestant than he can a Roman Catholic, because he lacks the first and chief qualification of either, viz.: a belief in Christianity. For while he, with the Protestant, denies the authority of the pope, he differs from both in not believing the Bible, or in Jesus Christ and his religion. The infidel and the pagan stand alike; they are

both anti-Catholic, and equally anti-Protestant. They each lack the first element necessary to make them either Catholic or Protestant, and that element is Christianity. Jews believe in the Old Testament and not in the New. Mohammedans receive the whole Bible in a sense, but receive and acknowledge the Alcoran as of higher authority, and accept Mohammed as a greater prophet than Jesus. Neither believes the system of Christianity, as taught in the New Testament. They are both alike anti-Catholic and anti-Protestant, for the reason that they are both anti-Christian. A Roman Catholic is a Christian who admits the authority of the pope; a Protestant is a Christian who denies that authority; and no one not a Christian can be either a Catholic or a Protestant, any more than a man can be a Jew (religiously) who does not believe in Moses or the Pentateuch, or than he could be a Mohammedan who did not believe in Mohammed or the Alcoran. Since the days of Luther, Romanists and Protestants have constituted, and still constitute, the two great divisions of Christianity in western Europe and America.

This question becomes of little importance in this case in the view we take of Art. VI of the bill of rights. But still, as it is argued and held by one member of the court that the word Protestant in that article, as well as in all other places, where that word is used in the constitution, means simply anti-Roman Catholic and nothing more; and also, that the word Christian in said article is used in a sense having no reference to Christianity as a system of religious doctrines, but in some indefinite sense which would include all good men who behave well without regard to their religious belief, we, for a moment, in passing, advert to these positions, in order to state the views of the majority of the court upon those subjects. We have already cited some authority upon the word Protestant. There are numerous others. Felt, in his *Ecclesiastical Hist. of New England*, p. 6, says that the term Protestant since the Diet of Spire has been "applied to Christians who have withdrawn from communion with the Roman See." Chambers, in his *encyclopedia*, traces the meaning of the word Protestant from the protest of Spire down, and concludes that the essence of Protestantism consists "in the source from which and the way in which it proposes to seek for the truth in all matters of faith and practice," that source being the Bible, whose authority is held to be supreme; and that the same is not to be interpreted by tradition, but to be

explained by itself, its own language, and connection, which doctrine was the foundation stone of the Reformation. According to this definition, no one of course could be of the Protestant religion who was not also and first of the Christian religion.

The New American Cyclopædia, Vol. 13, has the following: "PROTESTANT, a collective name for a large class of Christian denominations," and embracing all such denominations, "except the Roman Catholic and Eastern churches. * * * The name Protestant came early into use as the collective name for all the Christian denominations in Switzerland, France, England, Scotland, Holland and other countries which proclaimed the Bible to be the only rule or faith." So in the Penny Cyclopædia, Vol. 10, is the following: "PROTESTANT, a general term comprehending all those who, professing Christianity, yet are not in the communion" of the church of Rome. So the government of England, when under Protestant rulers, passed laws against Jews, pagans, Turks and infidels; and also against non-conforming Christians, of which they enumerated two classes, Papists and Protestant dissenters; 4 Black. Com. 52, 57, 58; while the Catholics, when in power, punished in the same way Jews, infidels, pagans and Protestants. The church of England was never *the* Protestant church, but only *a* Protestant church — *one* among *many* branches of the great Protestant division of Christianity. Although the church of England was Protestant, being first Christian and then anti-Roman Catholic, yet they forgot to a great extent that the rule of private, independent judgment in matters of religion should apply alike to all; and they tried by legal enactments to make all others conform to their views just as the church of Rome had done before, and very much as the Puritans on a small scale did afterward in this country, when they persecuted Roger Williams and Wheelwright, the Baptists and the Quakers.

There was the same reason in all these cases. The church in each case constituted a part of the State. Each had their government or State religious establishment; and, in all such cases, whoever denies the State religion must be, to a certain extent at least, an enemy of the State.

Nicholson's Encyclopædia says: "PROTESTANT, a term now applied to all Christians who, in any country or of any sect, dissent from the principles and discipline of the church of Rome." To the same effect is the New Edinburgh Encyclopædia, title, "Ecclesiastical History," chap. 4, and the London Encyclopædia, "Protestant-

ism." And the *Encyclopædia of Religious Knowledge* says : "PROTESTANT, * * * has now of a long time been applied generally to the Christian sects of whatever denomination and in whatever country they may be found, which have separated from the see of Rome." The same work quotes Mr. Chillingworth as saying, "The Bible, I say, the Bible only is the religion of Protestants;" and the *Encyclopædia Americana* says : "PROTESTANTISM: the numberless sects * * * of Protestants all agree * * * in rejecting human authority in matters of religion, taking the Holy Scriptures as the sole rule of their faith and life, and adhering to particular creeds only as expressing the conviction in which all their members agree;" and see Neil's *History of the Puritans*, vol. 5, p. 149 and *seq.*

But let us look to the authority most in use—the dictionary. Webster's *Unabridged* gives, *first*, the original meaning, "one who protests," and mentions those who protested at Spire, etc.; *second*, especially, "A Christian who protests against the doctrines and practices of the Roman Catholic church; one who adheres to the doctrines of the Reformation." See, also, Worcester's *Unabridged Dictionary*: "Protestant,"—no exceptional instances are noticed in which the word was or is ever used to designate any one but a Christian. If such cases existed, where the term has been or might properly be used to denote those who were or are simply anti-Catholic, without regard to whether they were Christian, or pagan, or infidel, such enlarged or exceptional cases would have been given, as they are in all other cases. If the word had, at the time of our revolution, or when our State constitutions were adopted, received any enlarged or peculiar signification; if it was used at that time, or had ever been, to designate or include all who united in opposition to the church of Rome, whether Christian, Jew or pagan, such peculiar use would have been referred to in the dictionary, and some sentence given in which it had somewhere, or at some time, been used in that sense, or with that significance. But no such meaning of the word is given, no allusion made to any such use of it, no instance or sentence mentioned in which it was ever applied to, or used to denote, any religious sect or denomination, or any sect or party whatever, except they were Christians. To be Protestant they must first be Christian.

But what is Mr. Abbott's view on this subject? What does he understand by the word Protestant? His own admissions are cer-

tainly good evidence against himself in this case, and probably the other defendants will not complain, if we quote his opinion as authority on this subject, since they all (except himself) recommend him in their answer as being "honest, sincere, truthful, and clear in his expression;" and all admit his power of intellect and learning. In his sermon of March 15, as reported in the *Dover Gazette* of March 20, 1868, which has been proved and introduced as evidence in this case, he states that Christianity is only one among many religions into which the human race is divided, and says: "Precisely as Methodism or Episcopacy * * * is only one division of Protestantism, precisely as Protestantism is only one division of Christianity, so Christianity is only one division of religion." And in another sermon, preached November 15, and reported in the *Dover Gazette* of November 20, 1868, he says: "If questioned whether I regard myself as a Protestant, in the plain meaning of the article, I should certainly say, No! If the word Protestant means all who protest against the authority of the Romish church, then I am, of course, a Protestant; and so is every Jew, Mohammedan, Parsee, or even atheist. But that is not the common meaning of the word, nor the meaning of Art. VI in the bill of rights. Fairly interpreted, the word Protestant covers only those Christians who reject the Romish church, and in that sense I am not a Protestant. In fact, I am a Protestant in no sense in which a Jew is not a Protestant."

"Protestants * * * are one division of the Christian religion, and all who are of the Protestant religion are of the Christian religion. Under our constitution none but Protestants can hold certain offices, * * * unless Unitarians are to be reckoned as of the Christian religion, no Unitarian is eligible to the office of governor, senator, or representative." *The Dublin case*, 38 N. H. 459, 573.

Thus we see that the requirements of our constitution, in relation to these officers, demand something more than that they should be simply anti-Roman Catholic. It is no negative qualification that is required, but a positive and affirmative one. They must be of the Protestant religion. To be of the Protestant religion, they must necessarily be of the Christian religion, because a man cannot be a Protestant without first being a Christian. We do not understand by this that such officers must be members of any Christian church, but that they must assent to the truth of Christianity, and thus be nomi-

nally Christian. The Encyclopædia of Religious Knowledge says the term "Christian," when used in its more strict, scriptural, and theological sense, denotes "one who really believes the gospel, imbibes the spirit, is influenced by the grace, and obedient to the will of Christ;" and this it calls the "sacred and proper" use of the word. It mentions another use of the word, which it calls the "political or conventional" use, which denotes one who assents to the doctrines of the religion of Christ, and who, being born of Christian parents, or in a Christian country, does not profess any other religion, or belong to any other of the divisions of men, "such as Jews, Mohammedans, deists, pagans and atheists;" or, as is said in another part of the article, "Christians may be considered as nominal, and real."

It may be proper to remark, that in this opinion we use the term Christian in its "political and conventional sense," as above stated, that being the sense in which it is ordinarily used in constitutions and statutes and legal documents; in other words, "nominal Christians." Mr. Webster thus defines the word "Christian:"

1. One who professes to believe, or is assumed to believe, in the religion of Christ; especially, one whose inward and outward life is conformed to the doctrines of Christ.
2. One who is born in a Christian country, or of Christian parents.

This first definition recognizes the same distinction above stated. First, he gives the political or conventional use — "one who professes to believe, or is assumed to believe, in the religion of Christ;" then the special, scriptural, and theological use above-mentioned. His second definition is substantially covered by the first part of the first, for those born in Christian countries or of Christian parents are always reckoned and counted as Christians nominally, "are assumed to believe in the religion of Christ" so long as they do not profess any thing else. This is always assumed until the contrary appears. But when such citizen or child openly renounces and abandons the religion of his country or his parents, and embraces some other, such as paganism or infidelity, he is not and cannot be any longer assumed to be a Christian. So the children of Protestants are generally reckoned and assumed to be Protestants, and the children of Roman Catholics are assumed to be Catholics, until they profess or claim to be something else. But when the child of Protestant parents professes to believe the doctrines of the church of Rome, and claims to be a Romanist, he

cannot any longer be reckoned or assumed to be a Protestant. So, when the child of Roman Catholic parents renounces the religion of his parents and embraces the faith of some Protestant sect, he is no longer counted or assumed to be a Romanist, because he has made an election or choice for himself, and is thenceforth a Protestant or Catholic, a Christian, a pagan, or an infidel, according to that election and choice, and according to his belief, whatever it may be.

It follows that no man can properly be reckoned, counted, or assumed to be a Christian, who does not believe or assent to the doctrines of that religion. But one who has embraced some other system of religious doctrines; who has elected and chosen not to be, and not to be called, a Christian; who has renounced Christianity and openly professed some other faith — such a man, not being of the Christian religion, could not be of the Protestant religion.

The question next arises, whether in Art. VI, in the bill of rights, which authorizes “the support and maintenance of public Protestant teachers of piety, religion and morality,” there is any thing which was intended to be, or can properly be held, directly or by any implication, to forbid the support and maintenance of any other teachers of religion who may not be Protestants? It will be seen at once, by an examination of this article, that there is nothing in it which directly forbids the employment of any person as a religious teacher by those who choose to employ and pay him. So far as any direct provision or statement in that article is concerned, we are clear that no person is prohibited from teaching any religious doctrine he may choose, whether it be Jewish, pagan or infidel; nor is any person directly prohibited from supporting and maintaining such religious teacher, provided they do it at their own expense, and in a proper way, so as not to disturb the public, or any private citizens, in the similar enjoyment and exercise of their religious rights and privileges.

But, is there any thing in this article, or any kindred article, which by any implication can be held to forbid the employment of any religious teacher by any person or persons, or by any town, parish or religious society whatsoever? It may be important, in considering this question, to consider, first, what natural right is declared in Art. VI of the bill of rights. It declares that “the people of this State have a right to empower, and do hereby fully empower, the legislature to authorize, from time to time, the severa

towns, parishes, bodies corporate or religious societies within this State, to make adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality." This right is not conferred by this article, but only declared, stated, asserted, as something inherent in the people—a right they had before this declaration of rights, as much as after. It is one of the "natural, essential, and inherent rights" that belong to all men, as declared in Art. II, some of which they may "surrender up to society in order to secure the protection of others," as is declared and set forth in Art. III. But it is also one of those *rights of conscience* which is declared in Art. IV to be not only a natural right, but an "unalienable" right; in its very nature, one which cannot be surrendered to government or to society, because no equivalent can be received for it, and one which neither the government nor society can take away, because they can give no equivalent; one of the "natural, essential and inherent rights" which belong to all men—and not only that, but an inalienable right which a man cannot surrender, and which government or society cannot take from him, as declared in Art. V. "Every individual has a *natural* and *unalienable* right to worship God, according to the dictates of his own conscience and reason;" and it is also his "natural and unalienable right" not to be "hurt, molested or restrained in his person, liberty, or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments, or persuasion," provided he does not disturb others.

The right of the people to employ one kind of religious teachers in their towns and religious societies is declared in Art. VI, but does the declaring or stating of one natural and inalienable right take away any other rights which are just as inalienable as the one here declared? The rights of conscience of a Roman Catholic are just as inalienable as those of a Protestant, and the rights of conscience of a Jew just as inalienable as those of a Christian, whether Catholic or Protestant. Neither society nor government can take away either, because in each case the right is declared to be "unalienable." Can it be claimed, then, that the asserting, the stating, the declaring of the existence of one inalienable right, can, by implication, take away from the people another right just as inalienable as the one declared? That were absurd, impossible. In Art.

V there is a broad, a general, a universal statement and declaration of the "natural and unalienable right" of "every individual," of every human being, in the State, to make such religious profession, to entertain such religious sentiments, or to belong to such religious persuasion as he chooses, and to worship God privately and publicly in the manner and season most agreeable to the dictates of his own conscience and reason. And if he do it in a way not to disturb others, that right is without exception and without qualification. And can the assertion of the right of the people to support Protestant teachers of religion, as declared in Article VI, a right which existed before that declaration was made as much as after, and which would not have been stated or declared, unless it had been understood to have existed independent of that declaration, as a natural, essential and inherent right in every man, be held by implication to take away the rights of the same people to support any other religious teachers they may choose, when their right to do so under Article V is stated, declared and asserted, not only as a "natural," but as an "unalienable right?"

The framers of the constitution were very careful to state and declare the distinction between mere civil or political rights, although they were "natural, essential and inherent" rights belonging to "all men" (Article II), and the "rights of conscience," which had the additional quality and excellence of being "unalienable." These merely civil or political rights could be surrendered to the government or to society (Article III) in order to secure the protection of other rights, but the rights of conscience could not be thus surrendered; nor could society or government have any claim or right to assume to take them away, or to interfere or intermeddle with them, except so far as to protect society against any acts or demonstrations of one sect or persuasion which might tend to disturb the public peace, or affect the rights of others. Hence, the political right of holding or being eligible to the office of governor, councillor, senator or representative might be surrendered to the government or to society for the better security and protection of the rights of the whole people, and government or society might insist upon this surrender when deemed necessary for the public good, as was the case in Articles XIV, XXIX, XLII and LXI in part second of our constitution.

But when the rights of conscience come in question, the right of worshipping God, either privately or publicly; the right of mak-

ing "profession" of any religion, privately or publicly; the entertaining of any religious "sentiments," and the proper expression, maintenance and vindication of them, whether in private or in public; the right of belonging to any "persuasion," which word, in the sense in which it is here used, means "a creed or belief, or a sect or party adhering to a creed or system of opinions" (Webster's Dict.); the belonging to any sect or denomination, entertaining and professing, and in a proper way striving to maintain and to teach, both privately and publicly, any religious creed or belief whatsoever — these rights are all held to be "unalienable," and are forever secured and guaranteed to "every individual" in the State by Article V, in the bill of rights.

Now, it is only in connection with the exercise of some of these rights of conscience that religious teachers are desired or needed, or are supported or maintained. They are to assist the people or some portions of the people in their public worship of God; to teach and instruct them in the "sentiments" and doctrines of their "persuasion," or sect, or denomination, and the duties connected with and growing out of those doctrines and sentiments. Each religious sect, whether Christian, Jew, Mohammedan or deist wishes its own religious teacher to assist in the public worship of God, or publicly to teach the doctrines of its creed; and so long as they confine themselves to the requirements of Article V, as to disturbing others, and do not violate any other provision of law, they have an inalienable right to employ and support them, provided they do it at their own expense. The right of the people, which is declared in Article VI, to support, and to empower the legislature to authorize towns and religious societies to support teachers of the Protestant religion, is, in substance, only the same right which it is declared in Article V that "every individual has a natural and unalienable right" to do in regard to the teachers of any and all other religions or systems of religious doctrine. People of the Protestant faith would have had just the same religious rights and been entitled to the same religious privileges by virtue of the general provisions of Article V, that they are declared to be entitled to in Article VI. There is nothing, then, in Article VI that can be construed as forbidding, by any implication, the exercise or enjoyment of any right which is declared and asserted as belonging to all men equally in Article V.

Again, the proviso annexed to article VI shows the same fact: "*Provided, notwithstanding*, That the several towns, parishes, bodies corporate or religious societies shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no person of any one particular religious sect or denomination shall ever be compelled to pay toward the support of the teacher or teachers of another persuasion, sect or denomination." It might at first seem that the right which towns, etc., and religious societies are here declared to have exclusively of electing their own teachers, etc., is to be taken to mean by reference to the former part of the article, *Protestant* teachers; still, any other religious sect or denomination are not obliged to pay for their support, and such other religious sect or denomination may, as a voluntary association, by virtue of the rights guaranteed to each one of them individually by Article V, select their own teacher and pay him; and this expression, "any religious sect," etc., is clearly not to be confined to Protestants or even to Christians. The expression is, "any one particular religious sect or denomination;" it is *not* any sect or denomination of Christians, or of Protestants, but any religious sect or denomination, or any sect or denomination of any religion.

Again, the additional or third paragraph in Article VI, known as the "free toleration clause," shows that no exclusive privileges were intended to be granted to Protestants, in the matter of the rights of conscience or religious freedom, for it is there expressly provided that "every denomination of Christians, demeaning themselves quietly and as good subjects of the State, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law." By the first clause in this paragraph all denominations of Christians are made to stand equal before the law, which places Roman Catholics on the same footing with Protestants, both being alike Christians, the Roman Catholics being a denomination of Christians; and, finally, it is provided that no subordination of "any one sect or denomination to another" shall ever be established by law. Notice the three separate expressions in this article: "Any * * religious sect or denomination," including sects of all possible religions; next, "every denomination of Christians," are made equal; then, no subordination of "any one sect or denomination to another" is to be allowed — the last clause evidently

Hale v. Everett.

being intended to include and cover both the other clauses, and including all "denominations of Christians," whether Catholic or Protestant, and all "religious sects," whatever might be their religion. Observe the distinction here made between "religious sects," or "religious sects or denominations," and "denominations of Christians," for we shall find the same distinction kept up in the statutes that we shall have occasion to examine.

It will also be seen that there is equal power conferred upon the legislature in relation to any and all other "religious sects" which they may think it best to favor by their legislation, in Article V, of part second of our constitution, as is conferred by Article VI of the bill of rights, in favor of Protestants. "Full power and authority are * * given and granted to the said general court, from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as that the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this State, and for the governing and ordering thereof, and of the subjects of the same." We have already seen that it would not be repugnant or contrary to the constitution for the legislature to give to towns, parishes, bodies corporate and religious societies, the same powers in regard to any or all "religious sects," as well as to any or all "denominations of Christians," that are conferred, in regard to Protestants, by Article VI in the bill of rights. The legislature may, therefore, grant to "any religious sect," or to "any denomination of Christians," whether Protestant or Catholic, the same rights that are granted to Protestants; or rather, the legislature may grant to towns, parishes, bodies corporate or religious societies, the power, the right and the privilege of making "adequate provision, at their own expense, for the support and maintenance" of public teachers of any "denomination of Christians," whether Romanist or Protestant, and not only so, but of any "religious sect," whether of the Christian religion or of any other. *Company v. Fernald*, 47 N. H. 444, 448; *Concord R. R. v. Greely*, 17 id. 47, 54; *East Kingston v. Towne*, 48 id. 59, 60.

Under these provisions of the constitution of 1783, the law of 1791 was passed, entitled "An act for regulating towns and the choice of town officers." Section 10 of this act provided "that the inhabitants of each town in this State, qualified to vote as

aforesaid, * * * may * * * grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance and support of the ministry, schools, meeting-houses, school-houses, the maintenance of the poor," etc. Such towns had the exclusive right of electing their own teacher or minister (such as the majority might choose), and then they could assess a tax for his payment, just as any other town tax was assessed, and such tax might be collected as other taxes were, of all the inhabitants of the town, unless there were some who were of some "particular religious sect or denomination," differing from the public teacher or minister of the town; and when that fact was ascertained, such persons were to be excused from paying such minister tax, by the provisions of the constitution.

At the time of the adoption of the constitution of 1783, there were but few persons of any particular religious sect or denomination except the Puritans or Congregationalists. There were a few of the Church of England, or Episcopalians, a few Quakers and Baptists, and perhaps a few of the Scotch Church, or Presbyterians; so that for a time the taxes voted and assessed by the towns for the support of the ministry were collected of the inhabitants generally, with the few exceptions above stated, just as the taxes for the support of schools and other public purposes were collected. And these circumstances remained, with very little change, down to the time of the adoption of the constitution of 1792, which was the same as that of 1783, so far as all its provisions relating to the rights of conscience were concerned, and all the other provisions we have been considering.

But soon after this, many new religious doctrines were broached, and new opinions disseminated, and every new doctrine and opinion had its advocates and its followers, few and scattered at first, but gradually increasing in numbers and influence. The believers in these new doctrines assumed names as new in some cases as the doctrines which they believed, and they were not for a time recognized as numerous enough, or of sufficient importance to be considered as particular religious sects or denominations, and the majority for a while successfully refused them such recognition as religious denominations. But in 1804 the Freewill Baptists obtained an act of the legislature as follows:

"*Resolved*, That the people of this State, commonly known by the name of the Freewill Anti-Pedobaptists' Church and Society,

Hale v. Everett.

shall be considered as a distinct religious sect or denomination, with all the privileges as such, agreeable to the constitution." N. H. Laws (1815) 46.

This had the desired effect. They then had a legal name and a legal existence, as a particular religious sect or denomination, which compelled recognition, and excused them from the payment of taxes for the support of the preaching of any other denomination.

In 1805 the Universalists obtained a similar act, constituting "all the people of this State known by the name of Universalists," "a distinct religious sect or denomination from any other;" and in 1807 the Methodists obtained a similar act, and in both these cases, with similar results. Id. 46.

These men had been taxed before to support the religious teachers or preachers which the several towns had elected and employed, not because they were understood to be Congregationalists or anti-Congregationalists, but simply as citizens of the town, all of whom were made liable to support the preacher chosen by the town, unless they could excuse themselves under the article in the bill of rights on the ground that they belonged to some "particular religious sect or denomination" different from that of the town preacher. It will be observed, that to be a distinct religious sect or denomination, it was not necessary that they should be Protestants, or even Christians. If they were "a religious sect," that was enough to excuse them from paying the religious teacher of the town; and then they might voluntarily unite and support any religious teacher they chose, at their own expense, and might meet for public religious worship, preaching, or religious teaching, without regard to the doctrines taught, provided they did it conformably to the laws. They must not be guilty of blasphemy; they must not teach or countenance any infraction of the laws; they must not disturb the public peace, or disturb others in their worship. Within these limits, Article V in our bill of rights secures to every man in the State entire freedom in his "religious profession, sentiments, or persuasion," and the right to worship God, privately and publicly, "according to the dictates of his own conscience and reason."

In 1819 an act was passed in amendment of the law of 1791, 2 N. H. (Laws of 1824) 44 — by which so much of that act was repealed as authorized towns to elect or support religious teachers

of any kind, Protestant as well as others; and it was provided "that each religious sect, or denomination of Christians in this State, may associate and form societies, may admit members, may establish rules and by-laws for their regulation and government, and shall have all the corporate powers which may be necessary to assess and raise money by taxes, * * * and to collect and appropriate the same for the purpose of building and repairing houses of public worship and for the support of the ministry," etc. No person could be compelled to join or support, be classed with, or associated to, any congregation, church, or religious society, without his express consent first had and obtained; and it was provided that any person might cease to be a member of such society or association by leaving a written notice with the clerk, etc. It will be observed that the legislators of 1819 were careful to adopt the precise language of the constitution into their act. Not only "each denomination of Christians," including Roman Catholics as well as Protestants, but also "each religious sect," may associate and form religious societies, with power to assess and collect taxes, and to appropriate the same for religious purposes.

So the act of 1827, entitled "An act empowering religious associations to assume and exercise corporate powers," N. H. (Laws 1830) 462, provided "that the members of any religious sect, or denomination of Christians in this State, may associate together and form a society," with the various powers therein stated, among which was the power to hold real and personal estate "for the purpose of erecting and repairing a house of public worship, * * * and for supporting the ministry in such society." Here is a very slight variation in the use of words, but evidently without any intent to change the sense. The language is a little more general. "The members of any religious sect," instead of "each religious sect;" or, the members of any "denomination of Christians," instead of each "denomination of Christians." But in the revision of 1842 it was thought useless to keep up these old constitutional formulas any longer, and so they were all abandoned, and instead of so much circumlocution, a simple formula was adopted, which covers, and was intended to cover, at least, all the ground which was covered by the former expressions, and perhaps more. "Any persons" may associate themselves together, form a religious society, and become a body politic and corporate; may build and repair churches, and support the ministry in such society. Rev. Stat.,

chap. 144, § 1. The same expression is used in the General Statutes of 1867: "Any persons may associate together * * * as a religious society," etc. Gen. Stat., chap. 139, § 1.

Perhaps the laws of 1842 and of 1867 may, if the question ever arises, be held to go further than the laws of 1819 and of 1827, in this, that the religious societies formed under them may perhaps be held to be divested of their sectarian or denominational character, and to stand solely upon the ground of bodies politic and corporate, while societies organized under the laws of 1819 and of 1827 were recognized as sectarian or denominational societies, notwithstanding such organization, these acts only authorizing religious societies to be formed of such sects or denominations; and, instead of losing their identity in the body corporate, their peculiar identity as sectarian and denominational societies is carefully retained, while they are only authorized to exercise or assume certain special and limited corporate powers. While the acts of 1819 and of 1827 thus recognize and carefully retain the sectarian or denominational qualities and characteristics of all religious societies formed under those acts, the act of 1819 provides that "each religious sect, or denomination of Christians * * * may associate and form societies, * * * and shall have all the corporate powers which may be necessary" to assess and collect taxes, and appropriate the same to the building of meeting-houses and the support of the ministry; while the act of 1827 is entitled "An act empowering religious associations to assume and exercise corporate powers," showing a design to leave the religious societies with all their sectarian and denominational features, but to engraft upon them such powers, simply, as were necessary to enable them to support religious teachers, while the laws of 1842 and of 1867, in terms, at least, ignore any such distinction.

Under these provisions of the laws of 1842 and of 1867 there can be no doubt that "any persons," of any religious creed or sect, may form a religious society and may elect such religious teachers as they choose, and support them at their own expense, so long as they keep within the restrictions of the constitution in regard to disturbing others. What is said in the opinion in the *Dublin case*, 38 N. H. 573, that unless Unitarians are Christians they could not form a religious society under the statute, was evidently an error, and it is apparent upon examining the authority on which it is based. No reference is made there to the law of 1842, but the authority

quoted purports to be from the acts of 1819 and 1827, which are there said to authorize "members of any sect or denomination of Christians" to form religious societies. The conclusion there reached would undoubtedly be correct, if the authority of the acts had been such as the quotation would imply. But the authority of those acts is nowhere limited to "members of any sect or denomination of Christians." The scope of those acts is much broader than that, and includes all "religious sects" as well as all "denominations of Christians." The conclusion is wrong, simply because it is based upon wrong premises; while the conclusion that under our constitution none but Christians can hold the office of governor, senator or representative is right, because the words of the constitution make everybody ineligible to those offices except Protestants, or those who are "of the Protestant religion;" and to be of the Protestant religion, they must be of the Christian religion.

So much of the argument of the plaintiff's counsel as is based upon the assumption that none but "members of any sect or denomination of Christians" can unite and form a religious society under the acts of 1819 and of 1827 is not well founded, since those acts, as we have seen, authorize the members of any religious sect or denomination of Christians thus to unite and form societies, and not the members of any sect or denomination of Christians only.

But even suppose it had been so that none but Christians could form such a society under the laws of 1819 and of 1827 that would include Roman Catholics as well as Protestants, so that under either construction it would show conclusively that the legislatures of both those years understood that they were not restricted exclusively to authorizing the support of Protestant religious teachers only, but that they might as well make provision for Roman Catholic teachers of religion as any other. It would show that they understood the constitution as empowering them to authorize Roman Catholics to form religious societies, and elect and support their own religious teachers, as well as Protestants, if they thought it best to do so. But they understood, as the fact was, that the constitution had declared these rights of conscience to be inalienable; that they could neither be surrendered nor taken away nor impaired, and therefore they authorized any religious sect, as well as any denomination of Christians to form, religious societies.

When the Freewill Baptists, the Universalists and the Methodists wished to get relieved from that part of the town taxes which went

to pay the town preacher, and when the town authorities would not excuse them on the ground that they were a distinct religious sect, because they were not of any sect or denomination which had been hitherto recognized as such, but were what were then sometimes termed "new lights," all they had to do was to get the legislature to enact or resolve that they constituted "a distinct religious sect or denomination," and they could shield themselves under the provisions of the constitution. They did not need to be Protestants or Christians, or to be declared to be such in order to be entitled to that protection. It was enough if they were simply a "distinct religious sect." No one had any right to ask the question what their religion was. That was one of their rights of conscience to believe and to profess, and properly to maintain and teach any religion, any sentiments, any belief, any persuasion which their conscience and reason might dictate to them; and this right was not only a natural, but an inalienable right.

A comparison of our constitution of 1783 with the Massachusetts constitution of 1780 will tend to show that the framers of ours did not intend by Article VI, in the bill of rights, by any implication, to forbid the legislature from authorizing towns or religious societies to support other teachers besides Protestant, if they choose to do so at their own expense. It is a matter of history that one constitution was submitted to the people of New Hampshire in 1799, which failed to be adopted. Another was submitted in 1781, which was also rejected; but the same convention continued its sessions and remodeled it very materially, and sent it out again, and this amended constitution was the one which was finally adopted in 1783. Belknap says that this convention had more advantage than the former, "the neighboring State of Massachusetts having digested and adopted a constitution which was supposed to be an improvement upon all which had been framed in America." Farmer's Belknap's Hist. of N. H. 383, 384, 389. The Massachusetts constitution, in Article III of the bill of rights (Gen. Stats. of Mass. 14) asserted and declared "the right of the people to invest their legislature with power to authorize, and the legislature shall from time to time authorize and require the several towns, parishes, precincts * * * or religious societies to make suitable provision at their own expense for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases

where such provision shall not be made voluntarily. And the people * * * have also a right to and do invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, and stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend." Their legislature must not only authorize, but require, the towns, etc., and religious societies, to make provision for public worship and the support of Protestant teachers, that is, to enforce its performance when not done voluntarily; and the legislature might enjoin, and did enjoin, all subjects to attend upon the instructions of said Protestant teachers.

But the framers of our constitution, although they had before them this model constitution, inserted all the religious tests they thought necessary in connection with the civil rights of holding certain offices; but when they came to the rights of conscience, they boldly declared their inalienability, and only simply authorized the support of Protestant teachers of religion. They did not require it, or require that any religious worship be sustained or supported; nor did they require anybody to attend upon the instructions of these teachers or any others, and provided that no person of any different sect or denomination should be compelled to pay for their support. They evidently needed and desired to say something in favor of the Christian religion and the Protestant religion, in order to meet the expectations of the people in those times, but they said as little as they well could about it, so far as it was connected with the rights of conscience, and religious toleration and freedom. They did not intend, in Art. VI of the bill of rights, to confer, or grant, or assert, any rights that should in any way conflict with the broad and just declaration of the natural, the universal, and inalienable rights of conscience, as enunciated and set forth in Art. V.

We have before alluded to the fact that this society in Dover, in selecting its name, had in view two separate and distinct objects: one, to adopt a name as a corporate body under the statute, a name in which it could sue and be sued, and transact business as a body corporate; another object was, to select a name which should be descriptive of the "particular sect or denomination" of which its members were to consist, which should indicate the particular religious creed or belief of its members, and thus designate them

Hale v. Everett.

as a "particular sect," which had been recognized in the constitution, and upon which certain rights had been conferred in Art. VI in the bill of rights. A name was selected which accomplished this purpose, one which indicates and was designed to indicate the fundamental doctrines and tenets of the sect, as well as to furnish a corporate name.

This would probably be sufficiently indicated by the name itself. The people commonly known as "Freewill Anti-Pedobaptists," and the people known by the name of "Universalists," and the people known by the name of "Methodists," had each been declared distinct religious sects under the constitution, and were sufficiently described by those names to distinguish them as religious sects, not only from each other, but from all other religious sects or denominations then existing or known, each of which was equally well known by a name which of itself was a perfect and sufficient description of the fundamental doctrines of the sect thus named, so as to distinguish it from any and all other religious sects or denominations, so that it might assert its rights under the constitution to all the privileges of a distinct religious sect. This practice of designating religious sects by a name that should so describe their creed or association as at once to distinguish them from all other sects, was kept up after the act of 1819 took effect, the same as before; so that often, perhaps generally, the name assumed by religious societies, as in this case, was selected with reference not only to obtaining a corporate name, but also with reference to describing the sect, or of indicating to what sect or denomination the society belonged, by the use of a name which should describe the fundamental doctrines and peculiarities of such sect or denomination. Such was the fact in the case before us, and we think the name itself is a sufficient indication of that fact. But whether this be so or not is immaterial, since the evidence in this case makes it entirely conclusive that such was the intent of the founders of this society, which intent and purpose were well known to the proprietors who put the meeting-house in this case into the hands of trustees, to be forever under the absolute control of said society. By assuming that name, the society and its original members understood, and designed and intended that everybody else should understand, that they were and were to be a society of Unitarians and not of Trinitarians, of Christians and not of infidels; and this trust was established, and the use,

custody, and control of the house were placed under the direction of this society, with special reference to the belief, the sentiments, and the doctrines of the society, as belonging to a distinct religious sect or denomination as indicated by its name. All this is abundantly shown by the evidence in the case, if such evidence were necessary.

In numerous English cases the questions have been discussed as to religious charities and trusts, and what doctrines were fundamental in religion, and as to whether the private religious opinions of the founder of a charity or trust were competent to be proved in evidence in order to aid in giving construction to the words of a will or deed by which a charity or trust is created. Some of these are: *Attorney-General v. Pearson*, 3 Meriv. 353; S. C., 7 Sim. 290; *Attorney-General v. Drummond*, 1 Con. & Law, 264; *Drummond v. Attorney-General*, 2 Eng. L. & Eq. 15; *Glasgow College v. Attorney-General*, 1 House of Lords Cases, 800; *Attorney-General v. Wilson*, 16 Sim. 210; *Attorney-General v. Gardner*, 2 DeGex & Smale, 102; *Attorney-General v. Munroe*, id. 122; *Attorney-General v. Murdock*, 7 Hare, 445; S. C., 12 Eng. L. & Eq. 83; *Attorney-General v. Hutton*, 7 Irish Eq. 612; *Attorney-General v. Shore*, 7 Sim. 309, note; S. C., 11 id. 592; S. C., 16 id. 210. This last case, known as the Lady Hewley's charity, was finally carried to the House of Lords. See 9 Clark & Finn. 355. In this case the former cases are reviewed and the results and conclusions are stated in 1 Greenl. Ev. (4th ed.), § 295, note 3. The principles involved in that case and the earlier English cases cited have been incorporated into, and made a part of, our American decisions, as far as they are material in this case, as we shall see from an examination of the American authorities.

It was early held in New York, by NELSON, J., in *Field v. Field*, 9 Wend. 395, 400, 401, that a fund created by a religious society, for the instruction and education of children in the faith and doctrine of the society, as professed at the time of the creation of the fund, cannot be diverted from its original object and destination; and that if a diversion be made or attempted, a court of equity will interpose and correct the procedure, but that a court of equity will not attempt to enforce the peculiar faith or doctrines of either party, where there is a schism in a religious society, though their existence and nature may be incidentally involved in an inquiry relative to the rights of property belonging to such society; al

Hale v. Everett.

that the court does is to enforce the observance and execution of an ascertained trust. To the same effect are *Lawyer v. Cipperly*, 7 Paige, 281; *Gable v. Miller*, 10 id. 627; *Miller v. Gable*, 2 Denio, 492; *People v. Steele*, 2 Barb. 397.

In *Gable v. Miller*, 10 Paige, 627, it is held that the Court of Chancery has jurisdiction to prevent a diversion of the temporalities of a church from the purposes for which they were devoted by the donors, and to require them to be appropriated to the support of that form of worship and to the teaching of those doctrines for which they were originally intended. WALWORTH, Chancellor, in the opinion, page 647, says: "The exercise of jurisdiction by this court, in cases of this kind, is not without its difficulties. And I felt them pressing upon me in the case of *The Baptist Church v. Witherell*, 3 Paige, 276, so as to induce me to doubt whether civil courts could interfere. Since that time, however, several cases have arisen and been decided in this country and in England, which appear to settle the question in favor of such jurisdiction."

And in *Miller v. Gable*, 2 Denio, 492, 548, which was an appeal from the Court of Chancery to the Court of Errors, it is held that when property is conveyed to a religious corporation to promote the teaching of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, it is the duty of a Court of Chancery, under its general jurisdiction over trusts, to interpose for the purpose of carrying the trust into execution according to the intention of the donors; and that it was no reason why the court should not thus interfere to enforce such a trust, that a majority of such society, or the trustees elected by such majority, are in favor of such diversion of the trust from its original purpose; but the court would in such case be bound to interfere upon the complaint of a minority of said society against the majority. It was also held, that in ascertaining the purposes for which property conveyed to a church was intended to be devoted, the language of the conveyance, if clear and unequivocal, is conclusive. If the language is indefinite, extrinsic evidence, such as the tenets held by the donor, or the faith then actually taught by the donees, and the circumstances under which the gift was made, and that the *denominational name* of a religious corporation or society to which a donation is made, and the *doctrines actually taught* therein at the time of the gift, may be resorted to, in order to limit and define the trust in respect to doctrines usually con-

sidered fundamental, such as those in dispute between Trinitarians and Unitarians, but not as to lesser shades or points of doctrine not deemed fundamental. GARDINER, Prest., says he does not sympathize with the doubt expressed by the chancellor in *The Baptist Church v. Witherell* (which he has ceased to entertain), as to whether the trustees of a religious society are not independent of all control in reference to doctrine and modes of worship.

In *The People v. Steele*, 2 Barb. 397, it was held that the intention of the donors is the criterion by which to determine the purposes to which the property of a church has been dedicated; that if the grant expresses that intention clearly and unequivocally, that must govern. But where the conveyance is merely to the religious corporation by name, with no other designation of its purposes or trusts, the corporate or denominational name, in connection with the contemporaneous acts of the incorporators, may be a sufficient guide as to the nature of the trust, and that it is no excuse for the trustees of religious corporations, for any aberration from the line of their duty, for such officers to say that they have been directed to it, or are sustained in it, by a majority of those to whom they owe their appointment. And see *Lawyer v. Cipperly*, 7 Paige, 281; *Bowden v. McLeod*, 1 Edw. Ch. 588; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439; *Gibson v. Armstrong*, 7 B. Monr. 481; *Trustees, etc., v. Johnson*, 1 Watts & Serg. 1, where it is held that, where there was no express condition to that effect, it might be a breach of the compact of association for the majority of a congregation to go over to a sect of a different denomination, though it were different only in name. See *Scott v. Carle*, 9 B. Monr. 17; *Inhabitants of Princeton v. Adams*, 10 Cush. 129, 132; 2 Story's Eq. Juris., § 1191, *a* and note; Hill on Trustees, *467 and note.

In *Robertson v. Bullions*, 9 Barb. 64, 132, 133, after a very careful review of all the authorities, both English and American, the court came to the conclusion that a court of equity had power, upon the application of a portion of the incorporators in a religious society, to restrain the trustees from applying the temporalities of the corporation to the support of a person as minister who has been deposed from the ministry by the proper ecclesiastical tribunal, and has not been restored. That the support of particular doctrines or systems of worship or government, or a connection with some particular church judicatory, may be made a condition in a

grant or donation to a religious society; but if no such condition be expressed, none will be implied, except as to cardinal points; but that the corporate or denominational name may indicate the nature of the trust, so far as it respects doctrines deemed fundamental; and that if a society of one denomination become incorporated, it may be considered as designed and constituted for the purpose of advancing the vital doctrines or the Christian faith professed by that denomination; and that the trustees may be restrained from applying the property or the use of it to the promotion of tenets or doctrines clearly opposed and adverse to the fundamental principles of the faith and doctrine professed by the church or society at the time the trust was created.

This last case was carried to the Court of Appeals, and it was there held that religious societies, incorporated under the statute of that State, were to be regarded merely as civil corporations; and that when, in a conveyance in trust for religious purposes, the use is expressed in general terms, it cannot be inferred from the religious faith of the grantor that it was intended to limit the use to the support of the particular doctrines in which he believed, but that, where the language creating the trust is ambiguous, evidence of the faith of the donor, like that of surrounding circumstances, may be received to aid in the construction; and that in a religious society the majority of the incorporators, without regard to their religious tenets, are vested with the entire control over the revenues of the corporation. 11 N. Y. (1 Kern.) 243, 267. In the *Parish of Bellport v. Tooker*, 29 Barb. 256, 265, the same doctrine is maintained. One fact, however, appears which it may be well to note, and that is (p. 264), that the religious society in that case was incorporated without any mention or assumption of any denominational name or preference. The name of the society was simply "The Parish of Bellport." This case was carried to the Court of Appeals, and is reported as *Petty v. Tooker*, 21 N. Y. (7 Smith) 267, where it is held that corporations formed under section 3 of their act for the incorporation of religious societies have no denominational character, and none can be engrafted upon them; and that persons otherwise qualified do not lose their right as corporators to vote at elections by reason of their having individually or collectively renounced the doctrine and ecclesiastical government professed and recognized by the religious body in whose worship and services the corporate property had always been employed, and that the title

of trustees to office and to the control of the corporate property is not impaired by any aberration in doctrine or church government on their part, or on that of those by whom they are elected; and that the grant of corporate property must be made upon some express condition, in order that its use may be restricted to the propagation of any particular form of religious belief or ecclesiastical organization; and see *Burrill v. A. R. Church*, 44 Barb. 282, in which the same view is taken as in *Petty v. Tooker*.

So far as the case of *Petty v. Tooker* is concerned, we see no particular fault to find with the decision, as based upon the facts stated. The parish was incorporated without assuming any denominational name, without the mention of any such name in connection with the act of incorporation, and there was no trust created in that case except the legal duty which trustees as officers of the corporation owed to the corporation. Here, so far as appeared, was an unsectarian society, which had chosen officers as any other legal society might do, who had simply their duty to do to the society which had elected them. But in the case we are considering, the deed is to the trustees of this society, not for the use of the society, but for the use of the proprietors of the meeting-house; and said use of the house and its general custody were to be under the control of this Unitarian society of Christians. The deed might just as well have been given to the trustees of the first savings bank of Dover, and if subject to the same use, and that use had been made subject to the same control, the society would have just as much interest in the meeting-house as it now has. The society takes nothing under this deed, except that they are to have the control of the use of the house; and that might have been given to them just as well and just as effectually if the deed had been given to the trustees of the bank instead of the trustees of this society. The duty of the trustees as such to the society that elected them has nothing to do and no connection with their duty as trustees under this deed. They must hold the meeting-house just as anybody else would under a similar deed, and that had nothing to do with the discharge of their duty to the society as trustees.

We have seen that the decisions in *Robertson v. Bulhons*, in the Court of Appeals, and *Bellport v. Tooker*, in the Supreme Court, and the same case as *Petty v. Tooker*, in the Court of Appeals, and the other cases which follow those authorities, are all based upon the peculiar provisions of the statute of New York in relation to corpo-

rations. It is held that under that statute a religious corporation cannot be sectarian or denominational. But not so the statute under which this society was formed. The law of this State passed in 1827, under which this society was formed, authorized "the members of any religious sect or denomination of Christians" in this State to associate together and form a society. So, by the act of 1819, "each religious sect or denomination of Christians" in this State may associate. Was it understood that "the members of any religious sect," or that "each religious sect," when thus associated together, were at once to lose their sectarian and denominational characteristics? Were not the societies thus formed for the very and sole purpose of enabling the sect or denomination the more successfully to prosecute its peculiar sectarian work? No one was authorized in those statutes, in terms, to associate and form religious societies, but the different religious sects and denominations of Christians; and if they were at once by such association under a general law to lose their sectarianism and denominationalism, and no longer to be the sects or denominations they were before, then the effect of forming religious societies was certainly very different from what anybody supposed or intended. But that was not the design. The sects were to remain sects after such association the same as before. The different denominations of Christians were to retain all their denominational peculiarities. They were not to lose their identity by such association, but were to be different sects and denominations still. When they associated themselves together to form a religious society, they might keep their old denominational name, if they chose, and it would not lose any of its meaning or any of its force as descriptive of the tenets of the sect; or they might adopt a name that had no reference to the sectarian doctrines or creeds, as in the case of "The Parish of Bellport." By the force of our statute these religious sects, by associating together as religious societies, acquired the powers and rights of a corporation, so far as they were necessary to enable them to raise money to support a religious teacher and to build a meeting-house without losing any of their rights or powers as a religious sect. All these they retained the same as before. So that our statute had no such effect as the act in New York had upon which those decisions in *Bellport v. Tooker* and *Petty v. Tooker*, and others of the same kind were founded. Those decisions can, therefore, be of no weight as authorities in this case.

Under the constitution, religious sects or denominations were recognized, which were then only distinguished by their names, the names being sufficiently indicative of the doctrines of the sect : "Roman Catholics" was the name of one sect, "Presbyterians," of another, "Quakers," of another. A society which should take for its name "The First Society of Roman Catholics in C," or "The First Society of Presbyterians in C," or "The First Society of Quakers in C," would be understood as made up of persons of the sect which the name of the society indicated ; and if a donation of a church had been made to certain persons in trust for a certain use, which use was to be forever subject to the control of The First Society of Roman Catholics in C, or of the First Society of Quakers in C, the trust would have been held to be subject to the control of such of the society, and such only, as adhered to the fundamental doctrines of the society as indicated by the name, even though they might be a minority of those who at first were numbered among its members ; that a majority of the original society, if they had abandoned the principles and doctrines of the sect, would not be known as a society of Romanists or Quakers, for the purpose of administering such trust. So, of the Methodists, after, by special statute, they were recognized and declared to be a distinct religious sect. The name indicated the belief of the sect. The name in that case would also indicate that the church polity, or plan of church government, was different from that of the Congregationalists, just as the term Episcopalian or Presbyterian would indicate, in each, a different polity from the Congregational ; and after the acts of 1819 and 1827, which took away from towns all power to act as parishes or to support religious teachers, and give to the different religious sects, and denominations of Christians, and to them alone, the right to form religious societies, they retained all the powers and rights which they had before as sects, and acquired the additional powers of a corporation for certain limited purposes.

While the authority was granted to towns by the legislature to raise money to support the ministry and to build meeting-houses, these towns, being simply municipal corporations, could not be made sectarian or denominational ; while under the acts of 1819 and 1827, as we have seen, all religious societies were, and were to be assumed to be, sectarian and denominational ; and they might adopt a sectarian and denominational name, which should describe and declare

their faith, and at the same time answer as its corporate name ; or they might adopt a general corporate name merely, having no reference to the faith or doctrines of the sect to which they belonged, and then they would, of course, make a declaration of their doctrines, or creed, or confession, in their articles of association. It is not material in this connection to inquire whether religious societies, under our Revised or General Statutes, retain their sectarian and denominational character, which they had, and were presumed to have, under the acts of 1819 and 1827.

Under this condition of things, this society was formed by a distinct religious sect, by a particular denomination of Christians, and, instead of assuming a name which should merely answer as a corporate name in which to transact business, but which should not have any reference to the peculiar sect that had formed the society, they assumed a name which, while it answered for a legal corporate appellative, should also express, as definitely as language could be made to do, the peculiar creed or doctrines of the sect or denomination which formed the society. It was to be a "Unitarian society of Christians." Both these words in the name are as strongly expressive of the fundamental doctrines of the sect as words could be ; and it would be assumed in such a case, without any evidence, that the name was adopted for the purpose of expressing the peculiar and fundamental doctrines of the sect that formed the society ; and that this would be so understood by everybody.

Therefore, when a trust was created in certain persons, for the benefit or use of this society, or for the use of others, to be under the control of this society by its denominational name, by its distinctive sectarian appellative, it must be understood that the donor or founder of the trust had in view that fact ; and that, when he constituted his trust or use, and made it subject to the control of this society, he had in view, and referred more particularly to its sectarian and denominational qualities than to any other. It was only as a Unitarian society of Christians that the control of the use of this house was placed in their hands. This trust was reposed in them simply because they were Unitarian Christians, and not because they were an incorporated society. It was in them in the character of a distinct religious sect, a particular denomination of Christians, that the confidence was placed, and not in them merely as members of a civil corporation. Now, suppose such a society should, in the course of time, become equally divided ; just

half its members should secede from the faith and doctrines of the sect which formed the society, and the other half should adhere to such faith and doctrines, and each half should separately undertake to control the use of the house according to its own religious views, and the views of the two divisions were antagonistic, and the court were called on to enforce the trust: can there be a doubt that equity would require that the control of the house should be given to the division which adhered to the original faith? Would not that be carrying out the wishes and intentions of the original founders of the trust? But, suppose that the party which had seceded from the faith of the denomination should outnumber the other by one or more, could that change the reason of the case or its controlling equities? Would it not be the duty of a court of equity to look beyond the mere form of the thing to its material substance, and to say, in such a case, that the portion of the religious society, who adhered to the faith of the sect that founded the society, were entitled to control the use of the house, rather than the portion who, being still members of the society, in form, had renounced the faith of the sect which formed, and whose fundamental doctrines had given name to, the society?

We do not deny the right of individuals to change their religious faith, nor the right of members of religious societies to do the same, nor the right of whole societies as a body to apostatize from their original faith, and adopt a new one, antagonistic to the first. This is but exercising those very rights of conscience which are asserted in Art. V of the bill of rights, as the inalienable birthright of every inhabitant of the State. Nor is it the province of the court to decide or to inquire which faith is most consistent, or what doctrines are true or what are false; and it seldom becomes necessary for the court to turn its attention to theological studies in order to decide questions of law, except in cases like the present, where they are called upon to see that a trust is administered according to the intention of the original founders of such trust. If a trust is created or a charity given for the benefit or use of a sectarian society by its sectarian and denominational name, it is to be presumed that it was intended to be used to advance the peculiar doctrines of that sect; and if a meeting-house is conveyed in trust for certain persons, to be under the control of a society of Christians, it would be the duty of the court, upon proper application and proofs, to see that the house was controlled by a society of

Christians, and not by Mohammedans, pagans, or infidels, even though a majority of the original society have apostatized from the faith of the sect which formed the society.

We find in this case, upon the evidence, that the defendants, who claim to be a majority of the society, had in fact, most of them, seceded from the doctrines and faith of the original sect which founded this society, and were no longer, in any proper sense of the term, "Unitarian Christians." Whether they had not seceded from the society altogether, by uniting with an opposition society and acting in hostility to the sect and denomination which at first instituted the religious society to which they claimed to belong, and by other acts, may be a question, but one not now material to be considered in this particular connection.

We have seen that the decisions in *Robertson v. Bullions*, 11 N. Y., and *Petty v. Tooker*, 21 id., are not authorities here, because they are based upon the special provisions of the statute of that State, which provisions are not like those of the statute of this State. In fact, we do not find that these decisions in New York have been followed in other States, except in cases where there was a statute like that in New York. The case in 11 N. Y. was decided in 1854, and that in 21 id. in 1860. In 1862, *Winebrenner v. Colder*, 43 Penn. St. 244, was decided, where the church, by its charter, was declared to be independent, and its polity was Congregational; but the constitution of the denomination provided that no person should be accepted as a minister without a regular license, which was to be annually renewed by the eldership of which he was a member. Upon a bill in equity by the minority (who were willing to submit to the eldership and receive the minister sent them by it, and to conform to the discipline of the denomination) against the majority, for an injunction to restrain them and their minister from preaching or teaching in, or in any manner using, the church edifice. *Held*, that the church property was held in trust for the use of such of the congregation as adhered and were willing to submit to the regular order and discipline of the denomination; also, that a majority of the congregation, who had made use of the regular corporate forms to institute an organized resistance to the legitimate authority of their ecclesiastical superiors, and had instituted a minister as their pastor who had been expelled by the denomination, was not the true congregation.

In *Ferraria v. Vasconcellos*, 31 Ill. 25, decided in 1863, the court were unanimous in opinion; but opinions were delivered by several members. CATON, C. J., said: "As a matter of law, as I understand the decisions, the rule is, that, where a church is erected for the use of a particular denomination or religious persuasion, a majority of the members of the church cannot abandon the tenets and doctrines of the denomination, and retain the right to the use of the property; but such secessionists forfeit all right to the property, even if but a single member adheres to the original faith and doctrine of the church. This rule is founded in reason and justice, and is not departed from in this case. Church property is rarely paid for by those alone who there worship, and those who contribute to its purchase or erection are presumed to do so with reference to a particular form of worship, or to promote the promulgation or teaching of particular doctrines or tenets of religion, * * * and to pervert the property to another purpose is an injustice of the same character as the application of other trust property to purposes other than those designed by the donor. Hence it is, that those who adhere to the original tenets and doctrines, for the promulgation of which a church has been erected, are the sole beneficiaries designed by the owners; and those who depart from and abandon these tenets and doctrines cease to be beneficiaries, and forfeit all claim to the title and use of such property. These are the principles on which all these doctrines are founded." The same views are expressed in *Brunnenmeyer v. Buhrs*, 32 Ill. 183.

In *Attorney-General v. Moore's Executors*, 19 N. J. Eq. (4 C. E. Green), decided June, 1868, a distinction is made between a religious charity and an educational or eleemosynary charity, and though in the latter cases they held the name of the society to be immaterial by a divided court of seven against six, yet they all admit and claim that in the former case — that of a religious trust — the doctrines of *Miller v. Gable*, 2 Denio, 492, and *The People v. Steele*, 2 Barb. 398, were correct, and should be carried out; and that the remark of the court there made, that, in a grant to a religious corporation, "its distinctive denominational name, as descriptive of its ecclesiastical connection, was indicative of the particular religious tenets designed to be propagated, is applicable to societies established for religious purposes." BIDDLE, J., in the dissenting opinion of the minority, says: "Names, like titles to acts of the

legislature, may denote character and quality, or they may indicate but little. * * Churches are often named after saints, and no denominational character can be deduced from it. But when, in addition to that, a peculiar denominational name is added, as, for instance, St. James' *Roman Catholic* Church, no one could hesitate to believe that it meant what it said; that it showed, as plainly as words could make it, that the church which bore that name was a Roman Catholic church; and so of all other churches of any sect or creed. The name, whether Baptist, Episcopalian, Methodist, Presbyterian, or whatever religious sect it may be, is always considered as showing the denominational character of the church; and no one could reasonably think otherwise. Denominational names, so far as common observation goes, are only used to denote character, or some quality, when applied to church organizations."

We see very little evidence of any disposition to follow the decisions made by the New York court in *Petty v. Tooker*, 21 N. Y., and similar cases in that State, in the courts of any other States, unless it may be in some that have statutes similar to that of New York; and we think those decisions are not to be considered authorities here. * By our statutes of 1819 and 1827, religious societies have all the powers, rights and privileges of religious sects or denominations under the constitution, all the rights and powers of religious societies at common law—the statutes only conferring limited corporate powers, in addition to those held before,—while none of the privileges, rights, or powers of religious sects or of religious societies, at common law, are taken away or in any way abridged.

There is a class of cases, like *Wiswell v. First Congregational Church*, 14 Ohio St. 32, where it is held that, in case of a division of a religious corporation, where both parties still adhere to the tenets and doctrines and discipline of the organization, the property should be divided between them, in proportion to their numbers at the time of the separation. See *Niccolls v. Rugg*, 47 Ill. 47. No one can find any fault with that arrangement of the property in such cases; but the principle of those cases has no application here,

* In *Callens v. Cheney*, in the Circuit Court of Cook county, Illinois, decided in 1872, and reported in the *Chicago Legal News*, August 3, 1872, WILLIAMS, C. J., in speaking of the decisions in *Robertson v. Bullions*, 11 N. Y., and *Petty v. Tooker*, 21 Id., says: "These cases cannot be regarded as authority, except in States which have essentially the same statutes, and then only in instances where religious societies have organized themselves under such State laws."

for here both parties do not adhere to the tenets, doctrines, or discipline of the original organization. *Smith v. Swormstedt*, 16 How. 288.

It is well settled, that members who secede from a church organization or a religious society thereby forfeit all right to any part of the church property ; and whether there has been a secession or not, within this rule, "is a mixed question of law and fact, to be decided upon the evidence with a view to all the circumstances, including the acts of the parties and the motives which have prompted such acts. *Wiswell v. First Cong. Church*, 14 Ohio St. 32. In *Baptist Church v. Rouse*, 21 Conn. 160, it was held to be a question of fact for the jury whether there was a secession. See *Stebbins v. Jennings*, 10 Pick. 172, and cases cited ; *The Dublin case*, 38 N. H. 459.

We find that, in this State, in *The Dublin case*, 38 N. H. 459, it is settled, that the individual religious opinions of the donor cannot be received to enlarge or contract the meaning of general terms used in the instrument by which he established the charity.

But it is also held that "courts will resort to the original and long-continued application of a religious charity by the trustees, for aid in giving construction to doubtful terms in the instrument which establishes the charity," and that "where the original trustees, appointed by the founder of a religious charity, applied the fund to the support of certain religious doctrines, and that application has been long continued and acquiesced in, a court of equity will not interfere with the application," unless such interference was called for by the plainly expressed intention of the donor.

It would seem, then, that the proper principles to be applied in this case upon the weight of authority (not taking into consideration those authorities which are based upon the peculiar provisions of the statute of New York, and which can, therefore, have no application here) are, in substance, as follows : That the denominational name of a religious society to which or to whose use a donation or grant is made, and the doctrines actually taught therein at the time of the gift or grant and immediately after, and the length of time they continue to be thus taught without interruption, may be resorted to, to limit and define the trust in respect to doctrines deemed fundamental ; that where the conveyance is merely to the religious corporation by name, with no other designation of its purposes or trusts (as in this case), the denominational name, in

connection with the contemporaneous acts of the corporators, may be a sufficient guide as to the nature of the trust; that where there is no specific designation in the deed as to the particular religious tenets or doctrines, which it is to be used to advance or support, the denominational name may indicate the nature of the trust, so far as respects doctrines admitted to be fundamental; and that, if a society of one religious sect or denomination becomes incorporated with a strict denominational name, descriptive of the fundamental doctrines of the sect to which it belongs, it will be presumed that it was constituted for the purpose of advancing the vital doctrines of such sect or denomination, and that the society or those having control of property held in trust for the benefit of such religious society, should be restrained from applying the property or the use of it to the promotion of tenets or doctrines clearly opposed and adverse to the fundamental principles of the faith and doctrines of such sect or denomination at the time and immediately after the trust was created.

Now, that the terms Unitarian and Christian, when assumed as a denominational name, are both expressive of the most fundamental and essential doctrines and tenets will not probably be questioned. It was settled, in *Inhabitants of Princeton v. Adams*, 10 Cush. 129, 132, that the two systems of belief (Unitarian and Trinitarian) are essentially different in their doctrines and principles of faith; and METCALF, J., in the opinion, says: "We know of no school, either of theology or of jurisprudence, in which these two systems of faith were ever considered essentially the same. From the early days of Christianity they have always been deemed, as they have been in our day, antagonistic systems; and courts have decided that funds given to support the teaching of one of them are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment," citing *Attorney-General v. Pearson*, 3 Meriv. 353; 7 Sim. 290; *Shore v. Wilson*, 9 Clark & Fin. 355; *Attorney-General v. Shore*, 11 Sim. 592; 16 id. 210; *Attorney-General v. Drummond*, 1 Con. & Lawson, 210; 1 Dru. & Warren, 353; *Attorney-General v. Hutton*, 7 Irish Eq. 612, 614; *Müller v. Gable*, 2 Denio, 492, 548; *Kniskern v. Lutheran Churches, etc.*, 1 Sandf. Ch. 489; 2 Story on Eq., § 1191, a.

And if the term Unitarian be thus expressive of a doctrine so fundamental and essential, what shall be said of the term Chris-

tian? If the distinction is so great between two sects, both of which are admitted to be only different denominations of the same religion, what must the difference be between whole systems of religion—between Christianity and other systems of religion, as the Mohammedan or pagan, or between Christianity and infidelity—a disbelief in and denial of all the fundamental and essential doctrines of the whole system?

Difference in creed or belief of the Christian doctrines makes the different Christian sects; difference in name makes the different denominations, and the name in some way usually indicates or describes the sect; so it is the belief in the Christian religion, and in Jesus Christ as its author and as the true Messiah, that makes a Christian; and belief in the religion of Mohammed, and in Mohammed as a true prophet, makes a Mohammedan. It is a man's belief, his creed, that decides what religion and what sect he belongs to. The idea that any man, however good, can properly be called a Christian, who does not believe or assent to the truths and doctrines of Christianity and, first and foremost of all, to the doctrine that Jesus was the Christ, the true Messiah, "the Christ of God," is simply preposterous. A man's belief alone decides his religion and his sect. A man may be a Christian, in the political or conventional sense in which we use the word, if he assents to the truths of the Christian system. If he lives an upright life, it makes him a good or, as might be said, a consistent Christian. So a man believing the Mohammedan faith may be a good man. If his life is pure and correct, it makes him a good Mohammedan; but any amount of good living will not make a pagan a Christian, until he believes the Christian faith. An infidel may be a good citizen and a good man; a good infidel, but not a good Christian; because, while an infidel, he cannot be a Christian at all. There is and can be no doubt as to what the word Christian means, in its common use and acceptation, and as it is generally understood. All Christians believe in Jesus Christ as the true Messiah and the Saviour of men; in other words, that Jesus Christ was just what he claimed to be—"the Christ of God." It is to be presumed that the framers of our constitution, when they used the words in Article VI in the bill of rights, and also that the founders of this society in Dover, when they applied this name to their religious society as descriptive of the faith of the sect which formed it, used this word in its common and ordinary sense; such is the ordinary

Hale v. Everett.

and universal rule, unless something appears to restrict or qualify such ordinary meaning. "We are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language." They must "be intended to mean what they have plainly expressed, and no room is left for construction." *People v. Prudy*, 2 Hill, 35; S. C., 4 id. 384; *United States v. Fisher*, 2 Cranch, 399; Cooley's Const. Lim. 55; *Robinson v. Tuttle*, 37 N. H. 248; *Burnstead v. Alton*, 32 id. 250; *Mallard v. Lawrence*, 16 How. 261.

Let us then examine the records of this society in Dover, and the other evidence in the case, and see whether this society was, or was not, in fact, all that its name indicated, to wit: "A Unitarian society of Christians." They must be first Christian and next Unitarian. We shall also see, in that way, how the trust in this case has been administered. In Congregational organizations there is presumed to be a church, which is a constituent part of the congregation. Unitarians are Congregationalists, at least in this country. *The Dublin Case*, 38 N. H. The society embraces the church and all those who worship with the church. "Churches * * * in the call of a minister to be their pastor * * * act separately from and generally prior to the society or parish which embraces both the church and those who worship with them. The call of the church, however, is not valid unless the parish assents to it. The contract of settlement is made wholly between the parish and minister, and is obligatory on them only." *Encyclopædia of Religious Knowledge*, "Congregationalist;" *Dublin Case*, 38 N. H. 507, 508, and *seq.*; *Baker v. Fales*, 16 Mass. 520; *Baird's Religion in America*, 453, 454.

To find what are the religious opinions of any Congregational society, you must look to the creed or doctrines of the church which constitute its center and basis. A Congregational society is generally made up first of the church, and next of those who worship with the church and favor the same views, and who assist in supporting the preaching and public worship of that church. The society, as such, often, perhaps generally, has no creed or published religious opinions distinct from the church; the church is the basis or foundation of the whole. This is true in the Congregational societies in this country generally, whether orthodox or Unitarian. The ministers are generally settled by the society, as in this case, but they become pastors of the church as well as of the

society; and the creed or belief of the society is not to be sought in its constitution or by-laws, but in the creed or belief of the church with which said society is connected.

In this case, we find that all the ministers who were present at the ordination of Mr. Abbott are spoken of and described as pastors of the several *churches* from which they came; but they were all settled, no doubt, by their respective societies. "A church can subsist and perpetuate itself only by an organic connection with a society. The society is the soil for the roots of a Christian vine, supplying the new material to repair waste by death. A church not connected with a society would die out." Ellis' *Half Century of the Unitarian Controversy*, 424, 425, 429-431; *Stebbins v. Jennings*, 10 Pick. 172. A Congregational church is described by SHAW, C. J., as an "aggregate body or association — not a corporation or *quasi* corporation — formed within the religious society or parish; set apart from the rest of the society for peculiar religious observances, for the celebration of the Lord's supper, and for mutual edification." *Weld v. May*, 9 Cush. 181; Buck's *Ecol. Law*, 67.

This society in Dover, being formed as we have seen, and having erected their meeting-house and sold their pews subject to conditions above specified, made arrangements to dedicate their house to the worship of God. This was done by Christian ministers of Unitarian Congregational churches in the usual form. Their first minister was ordained by the same council of ministers that dedicated the house of worship.

But before the house was dedicated or any minister ordained, it was thought proper, and perhaps necessary, that a Christian church should first be formed and organized, as the body which was especially to occupy the house and direct in its public worship, and to which the pastor was to minister, by virtue of his connection with the society as its pastor and minister.

Therefore a church was formed, which was made up of members of the society who expressed "their earnest desire and solemn intention of forming themselves into a Christian church, for the purpose of observing Christian ordinances, obeying the precepts of Jesus Christ, and aiding each others' advancement in a holy life," and who, having solemnly declared their belief "in the gospel of Jesus Christ," etc., were declared and pronounced to be "a regular Christian church." And, "now that their house was about to be

dedicated, a minister of Jesus Christ to be ordained among them, they themselves formed into a Christian church about to enjoy the satisfaction and benefit of Christian ordinances," they were exhorted to let their hearts be full of gratitude and praise. See Church Records.

This church was thus formed the 17th day of February, 1823, and the next day (the 18th) their house was dedicated and their first minister ordained. Let us find what were the doctrines of this church, and they will indicate what kind of a religious society was connected with it. On the 26th day of April, 1829, at a meeting of this church and its pastor, "the following preamble and covenant drawn up by the pastor, having previously had the individual approbation of the members of the church, was adopted as the covenant of this church." See Church Records, and B. Barnes' 2d deposition.

"As it seems to be the duty of every Christian church cautiously to obey the injunction of the apostle, 'that all things be done decently and in order,' while at the same time it avoids imposing any thing by way of covenant or articles of faith, which may not be conscientiously complied with by all who profess faith in our Lord Jesus Christ, and thereby deprive many of the benefit of Christian ordinances who have a right and privilege to enjoy them; therefore,

"*Resolved*, That the following acknowledgment shall be the covenant of this church, to be assented to by all who may hereafter wish to unite themselves with us for the benefit of Christian ordinances: 'Do you believe in Jesus Christ as the Messiah, and accept his religion as a revelation from God, the true guide of your faith and rule of your duty? With a deep sense of your imperfection and weakness, and a humble and grateful reliance upon God for the pardon of sin and assistance in duty, will you solemnly and earnestly endeavor, by attendance upon the services of religion, and by the offices of Christian charity and piety, to become a sincere disciple of Jesus Christ? that, being faithful to yourself, your fellow men, and to God, you may not be found wanting in that day when he shall judge the world in righteousness by that Man whom he hath appointed.'

"*Resolved, further*, That any person wishing to unite with us in the celebration of the Lord's supper, his desire having been previously signified by the pastor to the church, he shall, unless some

serious objection be made, * * * be received, on the acknowledgment of the above covenant, or any other form of words he may prefer expressing a belief in Christianity, to the full communion of this church and to the enjoyment of all its benefits.

“Resolved, further, That baptism shall be administered to all who desire it, to themselves or their children, upon their assenting to the following declaration, which shall be put to them by the pastor before administering the ordinance: “Do you believe in Jesus Christ as the Messiah, and regard his religion as a revelation from God?”

A service of plate had been procured, and the Lord's Supper was administered to this church for the first time on said April 26, 1829.

The several pastors or ministers have uniformly been ordained by a council of pastors and delegates called from the neighboring Unitarian Congregational churches for that purpose.

Therefore, judging this society, as all religious societies must be judged, by the doctrines and ordinances of the church whose principles and preaching and public teachings the society sustains and supports, we find it to be not only Christian in name, but in its principles, doctrines and ordinances.

We also find that the following allegations in the bill are true: “That the main purpose and design of forming said society was the promotion of religious knowledge and Christian virtues by the maintenance of public worship, and the erection of a meeting-house for that purpose, where the doctrines of the Christian religion should be publicly taught and inculcated, as cherished by the sect of Christians known as Unitarians; that said society, from the date of its formation in September, 1827, down to the time of the dedication of the meeting-house, regularly maintained public Christian worship in said Dover on the Sabbath, and had preaching by regularly ordained ministers of the Unitarian denomination of Christians, who there at such meetings preached and taught the doctrines of Christianity as holden by the sect of Christians called Unitarian; that, from the time of the dedication of said meeting-house down to the 31st day of August, 1864, said society regularly maintained Christian worship on the Sabbath in said meeting-house, and during nearly all that time had preaching in said house by ministers of said Unitarian denomination of Christians, regularly ordained and installed over said society as its pastors by other clergymen of

said denomination, and that during that portion of the time, between the dedication of said house and said 31st day of August, 1864, when said society have been without settled ministers, they have uniformly had preaching on the Sabbath in said house from ministers of said denomination, and both said last-named ministers, and all the settled ministers of said society have, up to that date, preached and inculcated in said house on the Sabbath, and at all other times have publicly and privately taught and inculcated the doctrines of Christianity as believed and taught by the denomination of Christians called and known as Unitarians."

Let us next examine Mr. Abbott's religious opinions and theological views at the time he was settled as pastor over this society, and also at the time when this bill was filed, and see whether any, and if so what changes of views and of religious opinions have occurred in his case, and whether he was a Unitarian and a Christian at the time when they first employed him, and whether he continues so at the present time.

It appears from the copies from the records of this society and from the evidence that Mr. Abbott was ordained as pastor of the First Unitarian Society of Christians in Dover on the 31st day of August, 1864. That he then understood that he was to act as pastor of the church as well as of the society appears from the following extract from his letter of acceptance as found in the records of said society: "Unless our *church* shall be a united, earnest and working one, no amount of outward prosperity or social enjoyment can make it any thing but a wreck and failure, and I interpret your invitation as implying on your part a pledge of hearty support in all right works and ways." And at the time of his ordination he had his two children baptized, one about two years old, and the other an infant. They were baptized in the name of the Father and of the Son and of the Holy Ghost, as a consecration of them to the service of God. See Barnes' and Abbott's depositions. And we have no doubt that Mr. Abbott at that time assented to the declaration required by the church covenant, previous to the baptism of his children, viz., that he "believed in Jesus Christ as the Messiah, and regarded his religion as a revelation from God."

The council for his ordination was composed of ministers and delegates from several neighboring Congregational (Unitarian) churches, and the record of their proceedings is as follows: "On Wednesday, August 31, 1864, at 10½ o'clock, A. M., at a meeting of

pastors and delegates, present by invitation, for the ordination of Mr. Francis E. Abbott as minister of the First Unitarian Society of Christians in Dover, Judge H. A. Bellows was chosen moderator, and Rev. H. W. Foote, scribe. Mr. Hale read the record of the action of the society and their correspondence with Mr. Abbott. Rev. E. E. Hale moved that the council is satisfied with the proceedings, and is prepared to proceed to the ordination of Mr. Abbott. Rev. Dr. Clark moved that the scribe be instructed to furnish copies of this record to be entered on the records of this society. The meeting then adjourned." The exercises at the ordination consisted of the usual introductory prayer, reading of the Scriptures, ordination hymn, sermon, ordaining prayer, charge, right-hand of fellowship, address to the people, concluding prayer and benediction. He was, then, it would seem, a believer in Christianity, and was therefore either a Roman Catholic or a Protestant, and there is no claim that he was a Catholic.

We will next examine the main charge in the bill, viz., that Mr. Abbott has apostatized from the Christian faith and become a disbeliever in Christianity, and also in Unitarianism, and that he is now occupying said church, not as a public teacher of Christianity, but as an open opposer of Christianity, as an avowed deist or theist, disowning Jesus Christ as the Messiah, and his religion as the only true religion, and charging that said Abbott is now neither a Unitarian nor a Christian.

Mr. Abbott remained with this society, as pastor or religious teacher, till April 1, 1868, when, by his resignation, that relation terminated. Toward the latter part of his preaching he made statements that "Jesus Christ was like other men, with no more authority," and compared Christ with Garrison and other good men; that he doubted whether there was more than one pulpit in Boston that he (Abbott) would be allowed to occupy; stated that he was looked upon as a "rebel" in his theology (Barnes' 1st deposition); that he considered Christ as a mere man, and fallible like other men; that Christ was not the Messiah, and that if he (Christ) believed himself to be the Messiah, he was mistaken (Andrews' deposition); that the New Testament showed that Christ did claim to be the Messiah, but that he (Abbott) believed the Messiah had not come, and would not come (Bell's deposition).

He went on in this way, step by step, until he openly declared himself not a Christian, nor a Unitarian, so far as Unitarianism

Hale v. Everett.

was based upon Christianity or the recognition of Christ as the Messiah; proclaimed himself a theist, and preached his theistical doctrines to such an extent as to give great dissatisfaction to the members of the church and society, in consequence of which his subscription list fell off until he was advised by his friends to resign, which he at once did; and, by arrangement, his term of service terminated April 1, 1868.

On Sunday, the 15th day of March, 1868, said Abbott, in his public discourse, stated his belief in the following propositions: "1st, That Christianity is merely one among many religions; 2d, That each religion is partly true and partly false; and 3d, That pure theism, which is the common element, the universal essence of all religion, is by itself greater and truer than all." The following are also extracts from said sermon: "Whoever has been so fired in his own spirit by the overwhelming thought of the Divine Being as to kindle the flames of faith in the hearts of his fellow men, whether Confucius, or Zoroaster, or Moses, or Jesus, or Mohammed, has thereby proved himself to be a true prophet of the living God; and thus every great historic religion dates from a genuine inspiration by the Eternal Spirit." Speaking of the teachings of Jesus Christ, he said: "Love to God and to man is the epitome of his instruction, and this is simply faith in the Divine in its two-fold aspect. Hence I deem it right to say that Jesus was himself not a Christian, but a simple theist, and that simple theism is the entire burden of his life and doctrine." Speaking of the Messiah, he said: "I regard the doctrine of the Messiahship as, in any sense, a superstition of the times. The pretense that any man has been singled out to be a permanent Christ, Messiah, or Mediator to his fellow beings, is, to me, monstrous. Henceforth I claim to be neither a Unitarian nor a Christian, but simply a theist. * * * Jesus I believe to have been a theist, and Christianity I believe to be a perversion of theism. In resigning the names Unitarian and Christian, I do so with full knowledge of the grave, practical consequences that must ensue; but, wishing ever to be docile to the teachings of life, the step seems to me the plain lesson of recent circumstances."

In preaching his farewell sermon, March 29, 1868, he commenced as follows: "My text this morning is taken from no Hebrew Scriptures, whether of the Old or New Testaments. America is every whit as sacred as Judea. God is as near to you

and to me, as ever he was to Moses, to Jesus, or to Paul. Wherever a human soul is born into the love of truth and high virtue, there is the 'Holy Land.' Wherever a human soul has uttered its sincere and brave faith in the Divine, and thus bequeathed to us the legacy of inspired words, there is the 'Holy Bible.' To find my text, therefore, for the last morning of my ministry in Dover, I cannot travel across the Atlantic and the Mediterranean to ransack the Orient for a prophet, nor leap the gulf of eighteen centuries to find a word that shall fit this occasion, to me so earnest and full of moment. I am impelled to turn to some American scripture, instinct with the deep religion of the day. I am impelled to listen to some American prophet, whose soul is fired with the Divine suggestions and fathomless significance of all human life. This shall be my text, taken from a seer as truly and as highly inspired as any that ever prophesied in days of yore. I mean, Ralph Waldo Emerson."

In the course of this sermon, he alluded to the charge that he came among them as a "conservative," when his real views, when he came to express them, were most "radical." He said that in one of his earliest sermons he had taken the position that "Christ is a mere man," and that all his wonderful power is the simple product of character; that this doctrine is not a reproach to Jesus, but rather praise and exaltation. He then adds: "In these statements you have the germ of every thing that is radical in theology. The moment a man gives up the absolute Deity of Jesus, he cannot stop till he accepts his mere humanity, that is, *if he can think*. Unitarians, I confess, often succeed in stopping half way, but do it by ceasing to think. Begin to doubt the 'Deity of Christ,' and, if your mind is active and strong, you cannot stop doubting till you have doubted yourself out of Christianity into pure theism. That is where I am to-day — outside the warm shelter of the Christian church, in the vast expanse of God's boundless universe, yet still at home."

He assigns, as a reason for leaving the Unitarian denomination, the fact that, at their conventions in 1865 and 1866, holden at New York and at Syracuse, they adopted a platform distinctively Christian. He says: "I feel convinced that henceforth the Unitarians, as a sect, will maintain their stand on what is called 'distinctly Christian ground,' which, in plain English, means the Lordship or Messiahship of Jesus." In his deposition, taken in

Hale v. Everett.

this case, Mr. Abbott says: "Christianity, in my opinion, is religion, as taught in the New Testament, and more especially in the gospels, and based upon faith in Jesus of Nazareth as the Christ of God;" that the distinction between religion and Christianity "is substantially one of the bases on which the two rest. Religion rests on universal humanity. Christianity rests on the individual Jesus;" that he cannot longer coöperate with the Unitarian denomination, because it "has practically avowed its faith in the Divine authority of Christ;" and, in stating the reason why he is not a Christian, he says: "I believe that faith in Jesus as the Christ or Spiritual Messiah, in some sense or other, is essential to Christianity, and I do not entertain that faith in any sense."

The 1st of April, 1868, Mr. Abbott commenced preaching for and to an independent society, in a hall in Dover, and, after preaching there a few Sabbaths, he returned to the church of the Unitarian society, and preached there alternate Sundays for a few months. While thus engaged, he wrote to the editor of the *Liberal Christian*, a newspaper published in New York city, which communication, dated May 11, was printed in the number of that paper dated May 23, 1868, of which the following are extracts:

"The true historic significance of the Christian name is that of the 'Christian confession,' namely, that Jesus of Nazareth is the Christ of God. On this confession Jesus himself founded his church, and on this confession alone can Christianity, as a distinct religion, continue to stand. Etymology, history and philosophy prove equally that Christianity has no basis, except in the Messianic mission of Jesus as spiritual leader of humanity and Saviour of the world.

"Whoever is unable to regard him as in some sense or other the Hebrew Messiah, can call himself a Christian only in a private, esoteric or transcendental interpretation of the word, and therefore it seems to me at the expense of perfect sincerity.

"Wisely or unwisely I have come to the conclusion that in no sense is Jesus the Messiah or Christ of God. The soul is its own Christ. Humanity is its own Messiah. I reject Christianity that I may still cleave to religion, which admits of no mediator because it is immediate. There is no room in religion for the intervention of a third person. What distinguishes Christianity from religion is its error and limitation alone. What is universal in it belongs to religion, and not to itself. In discarding the Christian name,

therefore, I discard nothing but error and limitation, and because the step involves complete disconnection from all organizations calling themselves Christian. It is infinitely more than a mere matter of words. * * * The Unitarian conference have taken their stand upon the Christian confession, and all Christian bodies *must* take the same stand. Christianity *must* say something or other about Jesus, *must* in some way confess his moral leadership, *must* take him as a perfect exemplar and perfect teacher, *must* connect itself indissolubly with his historic personality.

"But religion has no more to do with Jesus than it has with Judas. It leaves the soul alone with God. It acknowledges no leader, is loyal to no master, imitates no exemplar, looks to no redeemer, needs no saviour, knows no Christ. The very heart of Christianity, as taught by Jesus himself, is the Christian confessed that 'Jesus is the Christ of God.' I cannot, in any sense, literal or metaphorical, make this confession."

It will thus be seen that any charges against the defendant Abbott, as set forth in the bill, are substantially proved. I have also given much that he said and wrote in connection with the words charged in the bill, for the purpose of showing that these words were spoken and written understandingly and deliberately, and expressed his sincere belief and honest sentiments.

In May, 1868, two protests were made in writing to the acting wardens of this society, one signed by over forty, and the other by eighty-five names, which were similar in purport, one of which was as follows:

"Whereas, A 'theist is neither a Unitarian nor a Christian,' and *whereas*, Christ and anti-Christ, being in nature and spirit antagonistical, cannot with propriety be preached from the same pulpit, and would necessarily tend to subvert the foundation on which this society is built,

"Therefore the undersigned members of the 'First Unitarian Society of Christians' in Dover, N. H., do hereby protest against the use of the church of said society, in whole or in part for theistical preaching or lectures, or for any purpose whatever not in harmony with the avowed objects of said society, which are the building up and sustaining a Christian society in Dover, under the protection of the constitution and laws of the State of New Hampshire."

In his deposition taken in this case, Mr. Abbott states that at the time of his said ordination in Dover (August 31, 1864), he re-

Hale v. Everett.

regarded himself as "a minister of the gospel of Jesus," but that now he claims "to be a minister, not of the gospel of Jesus Christ, but of the gospel of humanity," which he believes to be "the only gospel in harmony with the religious wants of the age;" that his views in matters of theology have changed since his said ordination, "in the sense of a natural growth and development;" that he was educated as a "conservative Unitarian Christian," but now finds himself obliged by his convictions "to stand outside of organized Unitarianism and of Christianity;" that his views in relation to the ordinances of the gospel have also changed since his ordination; that at that time he had his two children baptized; that it was done simply in recognition of his "grave responsibility for their wise training and religious education," but that he now regards "baptism as the symbol of admission into the Christian church;" that at the time of his ordination he "regarded baptism as a spiritual symbol of consecration to the service of God," but that he now believes all symbolical acts in religion to belong to an immature state of religious development," and that as minister of the independent society to which he was then preaching, he would not administer either the ordinance of baptism or the Lord's Supper; and that he now considers himself as independent in his religious belief and public religious teachings, of all bibles, churches and Messiahs; and that as he understands the term "Christian," no man who agrees with him in his belief in these respects can fairly and truthfully be called a Christian; and that he has formally withdrawn from the Unitarian denomination, and requested his name dropped from the roll of Unitarian ministers just prior to April 1, 1868.

We thus see that the charge made in the answer of the defendants (except Abbott), that said Abbott was a progressive man and that he changed his opinions from time to time, is true. Very radical changes had taken place in his views upon fundamental questions and doctrines in theology after coming to Dover, and before the filing of this bill. We are also satisfied that the further charge of the answer of all the defendants (except Abbott), that said Abbott "if free in his thought and free in his speech," is also true; and that he may properly be styled a "freethinker," in the technical sense of that term. We are also satisfied that he is "honest, sincere, truthful, and clear in his expression," as charged in the answer.

But the charge that the quotations in the bill, purporting to be from his sermons, "are garbled extracts, and taken alone are deceptive, tending, if not designed, to misrepresent the sentiment, tone, and spirit of his ministrations, seems to be wholly unfounded, as we have already seen. Indeed, Mr. Abbott for himself makes no such claim. He is too "honest, sincere, and truthful" to do so. In fact, he has done every thing that a man can well do to put himself, or as he expresses it, "to take his stand," outside of Christianity. 1. He does not believe in the facts, the doctrines, or the ordinances of Christianity. He does not admit that Jesus Christ was a leader, a master, or even an exemplar. He denies that he was or is a mediator, a redeemer, or a saviour of men. He does not receive him or believe in him as the Christ of God, the true Messiah. He does not believe that Christ was a prophet even, any more than Confucius, Zoroaster, or Mohammed was. He does not receive the Bible as a revelation from God, or as of any higher authority than the writings of Garrison and of Emerson. 2. He has taken particular pains to publish his disbelief of Christianity, by preaching and writing and printing his views, so that no one need be deceived, or mistaken, or misinformed in relation to them.

The charge in the answer that Mr. Abbott's views, when fully and fairly expressed, are "not peculiar to him, but are substantially held by many clergymen and others who call themselves Unitarians," is simply a charge that this class of Unitarians are not Christians; in other words, that a portion of the denomination known as Unitarian is not Christian, but purely infidel, simple deists. The charge to a certain extent may be true, for we find evidence in this case tending to show, that some who call themselves Unitarians claim to believe in the existence of a Supreme Ruler of the universe, and really believe nothing else, but are infidels or deists, and are not entitled to the Christian name any more than the pagans are. They may, *in one sense*, be Unitarians, just as all Jews and Mohammedans are, but they are not Unitarian Christians, because they do not believe in the fundamental doctrines of Christianity. And that those men who call themselves Unitarians while they are simply deists, and who only assume the name of Unitarians as a cloak to cover their bald infidelity, "are fellow-shipped by Unitarians" as the answer charges, if true to any extent, is simply owing to the fact that the denomination had undertaken to go along without any particular creed or established

Hale v. Everett.

articles of faith by which such men would be excluded ; and they are thus of necessity endured in the society and companionship of those who have no sympathy, nor any bond of Christian fellowship or communion, with them. (See Dr. Peabody's deposition.) So far as this part of the answer is true, it is simply saying that some who call themselves Unitarians are not Unitarian Christians, but Unitarian infidels. But the term "Unitarian," as descriptive of a religious sect, or denomination, is generally and properly used to denote a denomination of Christians, and of that great division of Christians known as Protestants. *Dublin case*, 38 N. H., before cited ; Baird's Religion in America, ch. 3.

The answer also alleges that "Unitarians have no rule of faith or creed of doctrines." In a certain sense, this is true. Unitarian Christians profess to take the Bible as their creed, and allow every person to read, and interpret, and understand the Bible for himself, according to such light as he has, using his reason and other powers of mind, as best he may, in aiding him to arrive at correct conclusions. But in another sense they do and must have a creed. The church in Dublin had a formal creed, or confession, or articles of faith, and the decision in that case only settles that Unitarians, who believe in such a creed or church covenant as that, are Christians. That decision is not an authority that all who call themselves Unitarians are Christians, without regard to their faith or belief in the doctrines of Christianity. *Dublin case*, 38 N. H. 459, 460, 466, 468, 571, 572. So the church in Dover had a "covenant," which was to be assented to by all who would unite with them for the benefit of Christian ordinances. This covenant was a creed. They must "believe in Jesus Christ as the Messiah, and accept his religion as a revelation from God, the true guide of * * faith and rule of * * duty." Now, a man's creed is what he believes. Trinitarians believe in the trinity or the tri-unity of God. That, so far, is their creed. Unitarians believe in the unity of God. That, so far, is their creed. Each has a creed which necessarily excludes the other. Different creeds constitute the different "sects." Each sect has a particular name, and that makes it a "denomination." A creed may have one article of belief, or many. What makes it a creed is the fact that it is the common belief of a sect, not its length, or its brevity. It would be impossible to have a sect, or denomination, unless there were at least some one ground on which they agreed ; and, so far as there was a common belief, just so far

they would have a creed, or a covenant. And the case is not changed, whether the creed contains one article of faith, or thirty-nine.

In the Encyclopædia of Religious Knowledge, *Unitarians* are designated as "a class of religionists, who hold to the personal unity of God in opposition to the doctrine of the trinity. * * * Unitarians profess to derive their views from Scripture, and to make it the arbiter in all religious questions. * * * In America, Unitarian opinions are much divided upon the point of Christ's pre-existence, while, on the other hand, the rejection of the tenet of his vicarious suffering (or suffering as men's substitute), along with that of his supreme deity, appears to be universally characteristic of the sect." See, also, Prof. Palfrey's article on *Unitarians*, in the American Encyclopædia; also, in the Encyclopædia of Religious Knowledge.

A belief in the unity of God, in the Bible as a divine revelation, the ultimate arbiter in all religious questions, and a rejection of the doctrine of the vicarious sufferings of Christ and of his supreme divinity, would seem to be leading articles in their belief or creed, from these authorities. See Dr. Channing's sermon on Unitarian Christianity, 3 Channing's Works, 59; Ellis' Half Century of the Unitarian Controversy, 48.

If there is any such Unitarianism as the defendants claim, and describe in their answer as having "never been exclusive, sectarian, or limited to Christian worship," it must be a kind of Unitarianism that stands "outside of Christianity," where Mr. Abbott stands. It is not Christian Unitarianism, nor is it Unitarian in the sense in which this word is ordinarily and properly used, denoting a sect or denomination of Christians.

It was not until about the year 1867 that Mr. Abbott's anti-Christian views and doctrines began to be made prominent in his preaching and public teachings. Up to that time he had been preaching in a way to satisfy the church as well as the society, he being the pastor of both, in the same way that all the preachers before him, to that society, had been. They had been preaching the doctrines of the church, which were those of the society, as a matter of course, which they were assisting the church to promulgate; distinctively Christian doctrines, such as that Jesus Christ was the true Messiah, and that his religion was a revelation from God, which was the true guide of faith and rule of duty. The distinctively Christian ordinances of baptism and the Lord's

supper had been administered to the church by all of these pastors, so far as appears, from the time when they formed the church, and each "solemnly declared their belief in the gospel of Jesus Christ," and when it was duly pronounced to be "a regular Christian church," down to the time when Mr. Abbott baptized his two children "in the name of the Father, and of the Son, and of the Holy Ghost," and assented to the declaration "I believe in Jesus Christ as the Messiah, and regard his religion as a revelation from God." During all this time, a period of full forty years, this meeting-house had been used regularly and statedly, by regularly ordained ministers of the sect known as Unitarian Christians, in preaching and teaching distinctively Christian doctrines, and in administering the distinctively Christian ordinances of baptism and the Lord's supper; such teaching and preaching, and such an administration of Christian ordinances there, as the church desired in order to help them to become what they so much desired in the commencement, to wit, "sincere disciples of Jesus Christ."

To such uses has this church or meeting-house been set apart, and appropriated and consecrated, from its very origin and inception, through the long period of forty years, down to 1867, under the special and particular direction and control of this society of Unitarian Christians. For forty years, as long as the children of Israel wandered in the wilderness, seeking the land of promise, has this trust been administered and applied to the support and maintenance of the doctrines and ordinances of Christianity, without any variation or cessation, and going back to the erection of the meeting-house, and also to the foundation of the trust, when the founders could see for themselves how the trust was applied and executed, and were satisfied, it would seem, with the way the whole thing was managed, under the direction and control of this society of Christians, to whom the founders of the trust had committed the custody and control of the house.

And, surely, if "courts will resort to the original and long continued application of a religious charity by the trustees" in order to aid them in giving construction to the instrument which established the charity (see *Dublin case*); or, if it be true that, "where the original trustees, appointed by the founder of a religious charity or trust, applied the fund to the support of certain religious doctrines, and that application has been long continued and acquiesced in" (*id.*), a court of equity will not allow such appli-

position; one at least that should, in some respect, represent and express the new doctrines they had embraced and proposed to promulgate; that they were bound, in good faith and common honesty, not to sail under false colors; that they should not seek to teach and disseminate anti-Christian sentiments and doctrines under the name of Christianity; that, like honest men, they should call things by their true names, and not seek, by fraud and false pretenses and false names, to advance and inculcate any system of doctrines, however good in themselves Mr. Abbott might think them to be, and in this we think Mr. Abbott was clearly right.

But, as a society of Unitarian Christians, Mr. Abbott utterly declined and refused to have any connection or association with them as their pastor or religious teacher. Now, the election of a religious teacher, contemplated by the constitution, was one that was to be accompanied by a contract for his support and maintenance. He was to be elected and contracted with. An election of one that could not be had, or of one that would not serve, would amount to nothing. The privilege which the constitution secured to religious societies was the privilege of electing and contracting with; of hiring such religious teacher as they chose to support, for themselves and in their own way. But this society has not elected, contracted with, or employed Mr. Abbott as their preacher or religious teacher in any way since his resignation was tendered and accepted, taking effect April 1, 1868.

The charge in this bill is against all the defendants (except Abbott and the wardens of the Unitarian society) as claiming to be members of said "First Unitarian Society of Christians in Dover," but as being, in fact, members of an independent religious society of which said Francis E. Abbott is the preacher, and against said Abbott as such preacher, and against said York, Folsom and Horsch, as wardens of the said Unitarian society of Christians. The plaintiffs charge in substance that the defendants have united and formed an independent society entirely outside and independent of said Unitarian society, and, in fact, antagonistic and hostile to it; and that, as such, they have employed Mr. Abbott as their preacher; and that the wardens of said Unitarian society have, in violation of their duty to said Unitarian society, allowed and encouraged said Abbott and his associates and fellow-disbelievers in Christianity as such independent society, to occupy the meeting-house of said Unitarian society since said 27th day of April; and that said war-

dens have allowed said Abbott in the pulpit of said house to preach not to said Unitarian society, but to said independent society; and that said preaching was not according to the views of the denomination of Christians known as Unitarians, but in opposition thereto and to Christianity generally; that the plaintiffs do not know who compose said independent society to which said Abbott claims to be preaching, but believe the same to be made up of said defendants (save said Abbott) and others; and that said wardens of the Unitarian society have assessed the pews in said house, and are proceeding to collect the taxes so assessed of the plaintiffs, and apply the same toward paying for the preaching of said Abbott in said house, not to said Unitarian society, but to another society whose views and doctrines are hostile to Christianity generally, and to the views and doctrines of Unitarians particularly—all which, it is alleged, is in violation of the duties of said wardens of said Unitarian society, and in violation and disregard of the rights of these plaintiffs.

In the answer the defendants (except Abbott) deny that they are members of any independent society, but claim that they are members of said Unitarian society, and that they are Unitarians, and that they employ Mr. Abbott to preach to them in their house, under and by authority of the vote therein set forth concerning the two divisions of said society and their occupancy of the house.

Mr. Abbott's answer is evidently drawn with great care, so as to say nothing in regard to this independent society. Had he been allowed to say any thing about it, he would no doubt have told, as in other cases, the plain and simple truth. But this may not have been thought desirable by the other defendants, and so in his answer, Abbott is put upon safe ground. He admits nothing and denies nothing, but says that for the year 1868 his engagement was made not with York, Folsom and Horsch, as the wardens of the Unitarian society, or with anybody who claimed to act for said society, but with Wallingford, Everett and Folsom, three of the defendants, "who claimed to represent very many of the other defendants in this proceeding, and some other persons, to preach for them for the term of one year; that his congregation have from Sabbath to Sabbath assembled in said meeting-house, and he has been, by said Wallingford, Everett and Folsom, directed there to preach; and that he has, in fulfillment of his said contract, conducted public religious worship in said house, etc., claiming

or exercising no other rights than are by him set forth in this his answer."

From this it will be seen that he does not claim to have been employed by the Unitarian society or its wardens, or by anybody acting in its behalf, or that he was preaching to said society, or that he had any authority from said society to preach in their house. He does not deny that his employers and the other defendants, whom they claimed to represent, with others, were acting as an independent society in open hostility to said Unitarian society. The non-committalism of this answer is by no means characteristic of Mr. Abbott.

But what are the facts as disclosed in the evidence. It will be borne in mind that Mr. Abbott, on account of the change in his views while at Dover, and finding that his present views were distasteful to the Unitarian society, had resigned his place as pastor of said society, which resignation had been accepted to take effect April 1, 1868, and that he had withdrawn from and terminated his connection with the American Unitarian society just before that time, and had publicly announced that he was neither a Unitarian nor a Christian, and had preached his farewell sermon to said society March 29, 1868. After this he was engaged and employed by an independent society, to which he preached until the 1st of October of the same year, when he preached his farewell address to said independent society of Dover, which was printed in the *Dover Gazette* of October 9, 1868, and which has been introduced as evidence in this case, and is not substantially contradicted.

In his address, he says: "When, therefore, I deliberately discarded the Unitarian and Christian names, this step was by no means a matter of words; it meant the standing aloof, albeit in utter solitude, from all Unitarian and distinctively Christian organizations. * * * I resolved, after the expiration of my Unitarian pastorate, to refuse to connect myself again, whether directly or indirectly, with any Unitarian or Christian society. * * * Immediately after the delivery of my farewell sermon, however, a movement started at the church door to retain me as a preacher in Dover, notwithstanding the public position I had taken. The next day, March 30, my friends in the old society, wholly without my knowledge, went to the parish meeting and elected radical wardens, with authority to supply the Unitarian pulpit as they should think proper. The plan was to invite me to preach to the

Unitarian society, not as its settled minister, but simply as its preacher for the present year, it being supposed that this course would leave me perfectly free to occupy my own ground *uncommitted to the Unitarian denomination*. The new wardens, therefore, invited me to preach in my old pulpit the very next Sunday; but I declined doing so until I knew precisely what relation I should thereby occupy toward my former society, and what would be its action at the adjourned parish meeting. During this interval, between the first and second parish meetings, I became convinced of two things, first, that my friends, having got control of the church, were strongly disinclined to form a new society; and secondly, that the proposed plan would conflict with my determination to stand wholly aloof from the Unitarian sect. At a meeting of my friends, therefore, held at the house of Mr. Wallingford, the evening before the second parish meeting (April 12), I said plainly and emphatically that I could not again become their preacher, unless they should either *change the name of the Unitarian society*, or else *form a new independent society*.

"After a full discussion, my friends concluded, as I was distinctly informed, to accept the second condition I had named, and to form a new and wholly independent society. At the parish meeting next day, after much wrangling, the following resolution was passed: '*Resolved*, That the wardens shall employ none other than Unitarian Christians to supply the desk in this house.' * * The radical wardens at once resigned, conservative wardens were nominated who refused to serve as such, and the meeting was adjourned a fortnight, for the purpose of then electing wardens who would serve. Thus at the second parish meeting the church passed into the control of the conservatives, and I believe there was, at that time, but one purpose among my friends, namely, to go into a hall, and start outside as an independent society. Meanwhile, a subscription paper had been carried round, with the following heading: 'We, the undersigned, hereby constitute ourselves an "*independent society*," for the purpose of maintaining free religious principles in Dover; and, in order to carry out this purpose, we agree to pay the sums set opposite our names, for the support of the Rev. Francis Ellingwood Abbott, as our preacher, for the ensuing year.'"

There is proof, from the records of the Unitarian society, that the votes which he refers to were passed by that society on the 30th

of March and 13th of April, as stated by him. We also have a copy of this subscription paper of the independent society, duly authenticated, attached to a deposition in the case, with the names of the signers. The total subscription amounted to \$1,061, which was subscribed by some forty-four different persons, many of whom were not members of the Unitarian society, and some of whom were Jews. See York's deposition.

Mr. Abbott continues: "Enough money was pledged on this paper to sustain the movement, and, having made a definite agreement with the leading men concerned in it, I held the first public services of the new society in American hall, Sunday evening, April 26th, and then and there announced the fact of my engagement as preacher to the independent society for the year. The next day, April 27th, the third parish meeting was held in the church, the former radical wardens were re-elected * * * and resolutions * * * were passed, assigning the use of the church to 'each of the two divisions of said society for one-half the time.' In consequence of verbal explanations made at the time * * * it was universally understood, both by radicals and conservatives, that it was intended to give to the *independent society* the use of the church for half the time. It has been, in virtue of this vote alone, thus understood, that I have conceived myself justified hitherto in preaching in the Unitarian church. If I had for a moment supposed that the audience to which I preached regarded itself not as a *bona fide* independent society, but only as the radical portion of the Unitarian society, I never should have consented to stand again in my former pulpit.

"About six weeks after our first services in American hall, I felt convinced that the independent society must either complete its legal organization, or else come under the suspicion of being a nonentity, a mere blind for deceiving the public in regard to the real nature of our movement. Accordingly, early in June I requested you to take such steps as were necessary to complete the legal organization of our society. You promptly voted to do so, and appointed a committee of three to report on this subject at an adjourned meeting."

The following is the official record of this adjourned meeting

"DOVER, June 9, 1853.

"At a meeting of 'The First Independent Religious Society' of the city of Dover, for the promotion of free religious principles.

Zimri S. Wallingford was chosen moderator, and Thaddens P. Cressey, secretary *pro tempore*. Jasper H. York, from the committee or permanent organization, reported the names of Zimri S. Wallingford, Lucias Everett, Josiah B. Folsom, for wardens, and Thaddens P. Cressey, clerk.

"On motion of Mr. Everett to proceed to the choice of officers, Zimri S. Wallingford, Lucias Everett and Josiah B. Folsom were chosen wardens, and Thaddens P. Cressey, clerk, for the ensuing year. The oath of office was then duly administered to the wardens and clerk.

"On motion of Dr. York, Jasper H. York, Russell B. Wiggin, John Bell, Mrs. Z. S. Wallingford and Mrs. J. B. Folsom were chosen a committee to draft by-laws, and report at the next adjourned meeting. The meeting was then adjourned to Tuesday evening, June 16, at 8 o'clock.

"(Signed) T. P. CRESSEY, Clerk."

(See deposition of Cressey.)

"After these proceedings," says Mr. Abbott, "I think we all believed that we had complied with all the conditions of forming a legal organization. Notice of the election of these officers was published in the *Dover Gazette*, and I at least thought we had done every thing required by straightforward dealing in the matter of organization. Of your *intention* to organize legally and completely, I think there could be no doubt at that time.

"In June, however, a complaint was made to the Supreme Court by the conservative members of the Unitarian society, asking that an injunction should be issued restraining us from occupying the Unitarian church * * * Your counsel in the case denies the existence of any independent society, declares that you occupy the church as Unitarians and nothing else, and hence makes it appear that, contrary to all my public statements, I am still the preacher of a Unitarian society. Such is his argument, as contained in his printed brief, and published to the community. He holds the opinion that your success in the pending lawsuit depends on the validity of this argument, and that you cannot occupy the church except as a Unitarian society, or the majority of it. By this argument, therefore, he has placed you in a very awkward predicament. If you go on and complete immediately your legal organization (some trifling details of which, as it turns out, are still wanting),

he says you will lose the church; but if you wait and win the case by means of his argument, I believe you will lose what is worth infinitely more than the church, namely, the principle for which we contend.

"We have taken the ground, publicly and privately, that we are an independent society: can we afford to win our suit on the ground that we are not? The case will not be decided till late in December. You have ample time to set this matter right. In my opinion, honor and integrity are at stake. Only one course seems to me just and right—to organize at once in accordance with the letter of the law, and then run the risk of losing the church. To postpone all action on the matter, and to hold the church until after December, as a majority of the Unitarian society, notwithstanding our public profession of being an independent society, this is a course I cannot adopt myself or be a party to, either directly or indirectly. I remained with you solely on condition of your forming an independent society, having a perfect right to say on what terms I could or could not conscientiously remain. I understood you to agree to comply with this condition. You and I both thought that it had been fully complied with. * * * I told you at the start I could not preach to a Unitarian society. You respected my scruples * * * and consented to form an independent society."

Jasper H. York, in his deposition, states that he is one of the wardens of the First Unitarian Society of Christians in Dover, for 1868; that it was several weeks after Abbott's pastoral relations to the society ceased, on the 1st of April, before he preached again in the meeting-house; that it was not till after his meeting in American hall; says that he (York) never gave permission to said Abbott to return to said church to preach, but that he did give such permission to the *executive committee of the independent society*. He is asked: "Who are the executive committee of said independent society? When and where were they chosen?" He answers: "Z. S. Wallingford is one, and I think J. B. Folsom and Lucias Everett are the other two. I don't recollect when they were chosen; they were chosen between the two adjourned meetings of the Unitarian society, or immediately after the last adjourned meeting. They were chosen before Mr. Abbott began to preach in the house, in May, at the house of Mr. Wallingford." Again, he says: "I never was chosen one of the executive committee of the

independent society; I think I was appointed one of a committee of three to nominate an executive committee."

Immediately after Mr. Abbott had preached his farewell to the independent society, the plaintiffs proceeded at once and took the deposition of Cressey, in order to find, if possible, the records of this society, which until then nobody had been able to find. In his deposition, taken October 15, he discloses the facts stated by Mr. Abbott. He finds and produces the records of the society, and annexes them to his deposition, confirming Mr. Abbott in every particular. On cross-examination, he is asked by Mr. Wheeler, his counsel, as follows: "About the time of commencing taking testimony in this case in June last, did not the defendants' counsel call upon you for information respecting the formation of an independent society, and for any records thereof? If so, what was the result?" Answer: "He did. I told him there had been none formed, * * * and I did not think enough of these minutes to mention them to him."

Mr. Cressey also says that Mr. Abbott, in September, 1868, "*sent in his resignation*, and that some of his friends met at Mr. Wallingford's, and as signers of a subscription paper, to raise money to pay him for preaching, *accepted his resignation.*"

It thus appears that this subscription paper, designed to constitute an independent society, was got up and signed between the two adjourned meetings of the Unitarian society, holden the 13th and 27th of April; that the independent society itself was organized about the same time, or immediately after the second adjourned meeting, April 27, and that these men, Wallingford, Everett and Folsom, the men with whom, Mr. Abbott says, in his answer, he made the contract to preach that year, were at this time acting as executive committee temporarily of said independent society, which had had probably several meetings before that of June 9, which appears from the records to have been an adjourned meeting, at which Dr. York, as a member of a committee chosen at a former meeting, upon the subject of permanent organization, then made a report, recommending a set of permanent officers of the society, who were then chosen "for the ensuing year," and who took the oath of office as wardens and clerk. After April 1, 1868, Mr. Abbott was employed by an independent society as its teacher and preacher. His subscription was raised by the members of such independent society, as such, distinctively and specially.

He was employed to preach to such independent society, and did preach to it, and when he closed he tendered his resignation to the same independent society, which met, and accepted it, and discharged him, and closed up the contract, though for certain reasons of policy it was then thought best to ignore the name of the independent society. The Unitarian society had nothing to do with electing, or contracting with, or employing, or paying, or consulting with, or dismissing Mr. Abbott; in fact, that society had nothing to do with him, except that he was allowed by the wardens of said Unitarian society to occupy their house and preach his anti-Christian doctrines there, as the plaintiffs claim, in well-known disregard and violation of their duty as such wardens.

What the defect in their organization was that prevented this independent society from becoming a legal society for all purposes, we are not informed. Whether in fact there was any such defect is not made certain, and we are led to doubt it. But if there was, it does not alter the case at all. That there was for a time such a society *in fact*, of which these defendants were acting members, many or all of them, there is no doubt; and that its purposes and objects were directly hostile to the purposes and objects of the Unitarian society is equally apparent, and must have been equally well known to its members; and so far as it affects the good faith of its members, it is entirely immaterial whether the independent society became fully organized as a legal society or not. If there was any defect in completing its organization, it was, no doubt, as Mr. Abbott says, owing to the notice which was served upon defendants of the commencement of legal proceedings, for we find that the next day after the independent society had chosen its officers "for the ensuing year," the plaintiffs served a notice (June 10) upon them, describing them as being in fact members of the independent society, citing them to appear before the Supreme Court at its law term, to be held June 16, at Exeter, when all at once, "in the twinkling of an eye," this independent society, which had been in existence as it would seem for about two months, raising large sums of money by subscription among its members for the promotion of its objects, which had contracted for a preacher for the year, had organized as a corporate body, assumed a corporate name, had elected its permanent annual officers, and kept and preserved a record of its doings, and had published a notice of its proceedings and doings in the public

newspaper, is ignored and abandoned, and its very existence is denied by the defendants, except Mr. Abbott, who alone, of all this independent society, as it would seem, is willing to admit the whole truth and abide the consequence. For a time the defendants seemed disposed to deceive Mr. Abbott by pretending to be independents, when their secret design was to continue with the Unitarians, and not form any independent society in fact; and this seems to have been their view up to the time of the third parish meeting of the Unitarian society, April 27, the next day after the first meeting of the independent society in American hall. But some six weeks after this, as Mr. Abbott says, or early in June he became convinced "that the independent society must either complete its legal organization or else come under the suspicion of being a nonentity, a mere blind for deceiving the public in regard to the real nature of our movement." Perhaps he became convinced that such had been the real purpose and object of the defendants (except himself) thus to deceive the public; but such was not his purpose, nor could he be long deceived or blinded in regard to their true objects. He, therefore, early in June, insists that the proper steps be taken to organize the independent society. They comply with his wishes, and vote to complete their organization as an independent society, and go on and, in fact, organize, adopt a name, choose their permanent officers for the year, choose a committee to draft by-laws to be submitted at an adjourned meeting which was appointed for June 16, and adjourned, all believing that their organization was complete and legal, and all intending that it should be so.

The defendants intended at that time to form the independent organization, and intended to leave and abandon the Unitarian society; and when they completed, as they supposed, the organization of the independent society, they left, withdrew from, abandoned and seceded from the old Unitarian society of Christians forever. Though they had been long hesitating, and though they might never have come to that point, except for the influence which Mr. Abbott exerted over them, yet they did finally come to the point of abandoning the old society and forming a new one, whose creed or sentiments, so far as it had any, were antagonistic to those of the old society. At that time (June 9), at the close of their meeting of that day, most of these defendants had not the most remote idea of ever going near the old Unitarian society of Christians again.

and such was the fact. These defendants, in the early part of June, 1868, were claiming to be an independent society, both publicly and privately, and were claiming to act as such in hiring Mr. Abbott, and were not claiming to act as any part or portion of the Unitarian society. They saw the inconsistency and impropriety of attempting or claiming to act in both these capacities at the same time. Mr. Abbott refused to be the preacher to the Unitarian society, or to any part or faction of said society, and the defendants had finally come, though late, to adopt his views, and had now formed the independent society in order to be able to retain his services, which they could not do as any part or portion of the Unitarian Society of Christians.

"We have taken the ground, publicly and privately, that we are an independent society," and not any part or portion of the old Unitarian Society of Christians, says Mr. Abbott, in substance; and no one denied the charge at the time, or does deny it in the evidence, though all the defendants (except Abbott) stoutly deny it in their answer; but the evidence establishes the fact beyond all question, notwithstanding the denial of the answer. The necessity of forming the independent society was to accomplish an object which could not be accomplished by the defendants as a part or portion of the Unitarian society. Mr. Abbott was not employed by the old society of Unitarian Christians, or by anybody in their behalf, nor by any part or faction of said old society as such, for the simple reason that he would not be employed by them, and would not preach to them, or any part of them, as Unitarians or as Christians or as members of a society that was called by that name. These defendants must not only form an independent society, but they must cease to be members of the Unitarian society of Christians in Dover, in order that they might be able to treat with Mr. Abbott, and secure his permanent services as their religious teacher and preacher.

To be sure, our acts of 1819 and of 1827 provided a way by which any member of a religious society might withdraw and cease to be a member of the same, simply by leaving a notice in writing to that effect with the clerk of such society. 2 N. H. Laws (1824), 45; id. (1830) 463. This furnished an easy method by which any member might withdraw from any religious society at pleasure and terminate all liability as such member; but it does not follow by any means that this was the only way that a person could cease to

Hale v. Everett.

be a member of a religious society. He might cease to be a member without giving the notice in writing, as was expressly held in *Baptist Church v. Rouse*, 21 Conn. 164, where it was held that though no such notice was given, yet that all the circumstances of the case might properly be submitted to the jury, to find, as a question of fact, whether there had been a secession from the old society or not; and in settling that fact, not only all the acts of the parties, but more particularly their intentions, were material. The acts and motives, which were held to be material, were evidences of intention, and the fact of secession is to be found or not upon all the evidence in the case, including acts with the motives that influenced them, and the circumstances under which they were performed, and more particularly the intentions with which they were done. The real intentions of the parties at the time would be of great and generally of controlling weight in the settlement of such questions of fact. *Wiswell v. First Congregational Church*, 14 Ohio St. 32; *Dublin Case*, 38 N. H. 459.

Having found as matter of fact in this case that these defendants had, on or before the 9th day of June, 1868, not only as they supposed formed a new and an independent society "for the promotion of free religious principles," but had abandoned and intentionally seceded from The First Unitarian Society of Christians in Dover, it follows that they forfeited all right to that society's property or any part thereof, or to the use of any property which belonged, or the use of which belonged, to the old society, and hence have no further claim to the use of the meeting-house in question for any purpose whatever. Hence it follows that the injunction asked for in this case should be granted, as well upon the facts of the case as upon the law.

We find that any claim that was made, if any was made, after the meeting of April 27, 1868, by most of these defendants to be members of the old society, and especially after they had fully determined to form and organize their new independent society, was simply a pretense, and without any foundation in fact; but as soon as the legal proceedings are commenced, and it is found that their success in the lawsuit may depend upon the fact as to whether they are members of the one society or the other, and when it is supposed that in order to succeed in this suit, the existence of the independent society must be denied, and that they must still claim to be members of the Unitarian society of Christians, we find the

defendants ready to take both positions, that they are still members of the Unitarian society of Christians, and that they are not, and have never been, members of any independent society, and are willing to deny the existence of any independent society, altogether. Their claims to be still members of the Unitarian society of Christians have just the same foundation that their denial of the existence of the independent society rests upon, which is simple assertion, unsupported by facts. The facts are all found to be the other way.

When Mr. Abbott saw how ready most of these defendants (except himself) were to abandon the independent society, and even to deny its very existence, after all that had been done by said society, and how ready they were to assume any new position that might seem necessary; when he saw how ready they were even to desert and betray him, and to compromise their own consistency and integrity, for the sake of success in a paltry suit at law, it is not strange that he left them when his year, for which he had engaged, was but half completed. His last prayer in Dover was, most probably, that he might be saved from his friends.

He seems to have understood their true position, when he suggested that, after having taken the ground, publicly and privately, as they had done, that they were an independent society, and were acting as such, they could not afford to win their suit on the ground that they were not, and when he boldly suggested to them that their honor and integrity were at stake, and could only be preserved by moving forward as an independent society, and abandoning the false position (in which they seemed willing to put themselves, in the hope of a temporary advantage in their suit) of claiming to be members of the old society, which they had abandoned and seceded from. Fortunate would it have been for these defendants had they listened to this last admonition of their religious teacher, and followed his friendly advice and timely counsel in this matter of worldly concern, as they had long been doing in all matters that related to their religious and spiritual interests; for, although by that course they might not have won their cause in the suit, yet they would have gained what would have been infinitely better.

Since preparing the foregoing opinion, I have read the first draft of the able and ingenious dissenting opinion in this case, and wish to make a few additional suggestions, partly in reply to that opinion, and partly in illustration of the grounds upon which the fore-

Hale v. Everett.

going opinion is based, and I prefer to make them in this connection rather than by way of a separate reply to the dissenting opinion. It is claimed, and many arguments are used to convince us, that the word Protestant, as used in the constitution of this State, has the sole meaning of anti-Roman Catholic, and that the word as there used was intended to cover and include all other classes, sects, and denominations, whether of Christians or of any other religion. Let us, in addition to the authorities already cited in this opinion, look a moment to see how the word had been used in the province of New Hampshire before the constitution, and how the same word had been used in New England during the same period.

The political organizations of the colonies were classed and known as provincial, proprietary and charter governments. New Hampshire, with others, belonged to the first of these classes, provincial governments. "These had no other written constitutions or fundamental laws than the commissions issued to the governors appointed by the crown, explained by the instructions which accompanied them. The governor, by his commission, was made the representative or deputy of the king, and was obliged to act in conformity with the royal instructions. He was assisted by a council, the members of which, besides participating to a certain extent in the executive functions of the government, constituted the upper house of the provincial legislature; and he was also authorized to summon a general assembly of the representatives of the freeholders of the province. The three branches thus convened, consisting of the governor, council and representatives, constituted the provincial assemblies, having the power of local legislation, subject to the ratification and disapproval of the crown." 1 Curtis' Hist. of Const. U. S. 4; 1 Story on Const., § 159.

The only written constitution which New Hampshire had, from the year 1679, when she was separated from Massachusetts and erected into a separate provincial government, was the commissions of her several governors or presidents, beginning with that of President John Cutt, in 1679; and this commission was printed at the commencement of the volumes of the New Hampshire Provincial Laws, just as the constitution now is. The commissions of the other presidents and governors, from Cutt down to the last Governor Wentworth, were, in the main, substantial copies of that of Cutt. N. H. Laws (of 1771), 1; 8 N. H. Historical Collections, 1, 455, 456; 1 Story on Const., § 80; 1 Robertson's Hist. U. S. 398, and *seq*;

Hutchinson's Collections, 522 ; Barber's Hist. of New Eng. 41 ; Belknap's (Farmer's) Hist. of N. H. 88 ; 1 Provincial Papers N. H. 373, 488.

"Governor Wentworth, in his last message to the assembly of the province, referred to the commission appointing President Utt, and a council as having 'laid the foundation of the constitution by which the province has since been governed,' and said the laws of the province rest upon this foundation." *State v. Rollins*, 8 N. H. 562.

In this commission to President Utt is this language: "And above all things we do, by these presents, will, require and command our said council to take all possible care for the discountenancing of vice, and encouraging of virtue and good living, and that by such examples the infidel may be invited and desire to partake of the Christian religion ; and, for the greater ease and satisfaction of the said loving subjects in matters of religion, we do hereby require and command that liberty of conscience shall be allowed to all Protestants ; that such especially as shall be conformable to the rites of the church of England shall be particularly countenanced and encouraged." 8 N. H. Hist. Collections, 5 ; 1 Provincial Papers N. H. 373, 378.

Under this commission to Utt, the councillors were qualified, and a general assembly elected ; and, at a meeting of the governor, council, and assembly, at Portsmouth, in March, 1680, the first code of laws was passed in the province of New Hampshire. 8 N. H. Hist. Coll. 10, and *seq.* ; 1 Prov. Papers of N. H. 383, and *seq.* Among the capital laws, the first that was passed was against idolatry. If they had understood that the term *Protestant*, in their constitution, to all of whom liberty of conscience was allowed, embraced all but Roman Catholics, then, of course, it embraced pagans, and they would hardly have provided first of all for punishing them all with death for exercising the liberty of conscience which was specially guaranteed to them in the constitution. Their second capital enactment was against blasphemy. Among their criminal laws were acts against profane swearing, profaning the Lord's day, and contempt of God's word and ministers. Neither their Christianity nor their Protestantism included Jews, Mohammedans, pagans or infidels.

A similar commission issued to Edward Cranfield as lieutenant-governor, in 1682 ; and at a meeting of the governor and assembly

November 14, 1682, various other laws were passed, and some of the former acts were modified; but the act against idolatry was not changed, though the same liberty of conscience is allowed to all Protestants in that commission as in the one to President Cutt. 8 N. H. Hist. Coll. 85; 1 Provincial Papers (N. H.) 433, 439, 444, and *seq.* Thus, the only constitution which the province of New Hampshire had, from 1680 to 1783, viz.: the commissions to the presidents and governors, had made provision that all possible care should be taken for the discountenancing of vice, and the encouraging of virtue and good living, so that by such examples the infidel might be invited and desire to partake of the Christian religion, and for the liberty of conscience to all Protestants.

Soon after the commission to President Cutt, containing the Protestant clause above quoted, a new charter was issued to Massachusetts containing provisions similar to those contained in Cutt's commission, and in that charter, granted in 1691 to Massachusetts, it was provided that there should be "a liberty of conscience allowed in the worship of God to all Christians except papists;" and under this charter the province of Massachusetts was governed until the revolution. Colony and Province Laws of Massachusetts (1814); 1 Holmes' Annals, 436; 1 Hutch. Hist. 415, 416; 1 Story on Const., § 71.

The commission to President Cutt, which was substantially the constitution of New Hampshire from 1679 until the revolution, provided for "liberty of conscience to all Protestants," while the Massachusetts charter, granted a few years later (1691) and continuing in force until after the revolution, provided for "liberty of conscience * * * to all Christians except papists." These two forms of expression were, and were intended to be, synonymous. The term "Protestant" was then and has ever since been used to include and describe "all Christians except papists." If the charter of Massachusetts had allowed liberty of conscience to all subjects, or to all men, or to men of all religions except papists, it might be an argument for the position that the term "Protestant," when used in a similar instrument, in connection with the same subject-matter, a short time before, was intended to include and describe the same class of persons, though it had never been used in that sense before.

But here we find the same government granting charters to two adjoining provinces with similar interests, inhabited by people of

the same lineage, language, customs and religion, at about the same time, said charters containing similar general provisions and designed for the same general object. There certainly is no apparent reason why the liberty of conscience granted by each should not be the same, and granted to the same class in each. Such was no doubt the intention; and, if the government of England had been asked what they meant by the expression "all Protestants" in the first, they could not have answered the question with greater technical exactness and truth than they did by the expression in the second, of "all Christians except papists." But that is not all. This same charter of Massachusetts, immediately after granting liberty of conscience, etc., provides that all *subjects* inhabiting in the province, and their children, shall have all the liberties and immunities of free and natural subjects, as if born within the realm of England. 1 Story on Const., § 71.

Here certain rights and immunities are expressly granted to all *subjects*, certain other rights to *all Christians* except papists; that is, to all Protestants, the term Christian being understood and used by them to include all who believed in or gave their assent to the *Christian* religion, including papists and Protestants. But "all Christians except papists," in the one case, or "all Protestants" in the other, did not include all *subjects* except papists, or anybody besides Christians, and especially did not include "the infidel," whose conversion to the *Christian religion* it was considered by them important "above all things" to secure.

Let us also examine for a moment the constitution which was proposed to the people of New Hampshire in 1779, and which was by them rejected. 4 N. H. Hist. Coll. 154. In the bill of rights of that constitution, article 5, it was provided, among other things, that the future legislature of the State shall make no laws "contrary to the laws of God, or against the Protestant religion." Id. 155. Here Protestantism is recognized as a *religion*, which it could not be if it was merely a negative. To be anti-papist does not constitute a religion. But that constitution went further than this. In the plan of government, article 8, was this provision. "all the male inhabitants of the State, of lawful age, paying taxes and professing the Protestant religion, shall be deemed legal voters in choosing councillors and representatives," and having, in addition to the above, certain property qualifications, "shall be capable of being elected." Id. 157. By that constitution, if adopted,

there would have been a Protestant test, not only in regard to councillors and representatives, but in order to be a legal voter, a man must be one "professing the Protestant religion." But a man need not profess any religion to be anti-Roman Catholic. If all that was intended had been to require that such person should not be a Roman Catholic in order to entitle him to vote, it would have said so in plain words, and then the door would have been open for all others—Jews, pagans and infidels—to have asserted their rights. But something more than that was intended. To be a voter a man must *profess a religion*, "the Protestant religion," the religion of Protestants, which was the Christian religion as embraced by all Christians except papists.

The pilgrims and other early settlers of this country, and particularly of this State, did not come here to escape Roman Catholic persecution, but the persecutions of the Church of England, one branch of the Protestant church, and their design in coming here was not so much to found a State that should be anti-Catholic, as one that should be particularly Christian; founded less, in fact, upon the constitution or laws of England, than upon the Bible as the law of God; and opposed to the Church of England, not so much in matters of doctrine, as in their views of church government, of ecclesiastical polity, discipline and worship. But they were Protestants whose religion did not so much consist in opposition to papacy or the Church of England, as it did in being Christians. They were Protestants because they were Christians first and primarily; and next, because they did not subscribe to the papacy. It was not a Protestantism which contented itself with simply differing from Rome, and had no system of faith of its own—a Protestantism that would include pagans and infidels as well as Christians.

Bancroft says: "The settlement of New England was a result of the reformation, not of the contest between the new opinions and the authority of Rome, but of implacable differences between Protestant dissenters and the established Anglican church." 1 Bancroft's History U. S. 266, 278; 1 Neal's History of Puritans, 131; 1 Hallam's History of England, 140; 3 Turner's History of England, 140, *et seq.* He further says that the system of religion revealed in Judea "was professed in every part of our widely extended country, and cradled our freedom" (2 Bancroft's History U. S. 454); and he adds: "Our fathers were not only Christians,

they were, even in Maryland, by a vast majority, elsewhere, almost unanimously Protestants" (2 id. 456); and their Protestantism was a protest against the supposed errors of the Church of England as well as those of the Church of Rome, and their object was to found a church and a government according to the word of God, Christianity being its great foundation stone, and freedom its main pillar of support. Belknap's History N. H. 42, 43; Robertson's History U. S. 408; Lowell Institute Lectures (1869), 383 *et seq.*; 403 *et seq.* (lecture of Judge Parker); Baird's Religion in America, 578; 1 Story on Const. U. S. 42, 43, 49, 54, 65.

And at the time of the formation of the constitution, the great mass of our people, as we have already seen, were Congregationalists, who were first Christians, and next Protestants, and then Congregationalists, opposed alike to popes and hierarchies and councils, and who insisted, first and last and altogether, upon the Bible as the direct and only revealed will and law of God, as a perfect rule of faith and practice, as the only sure guide in ecclesiastical polity, discipline and worship. To them the Bible was the fountain of all religious truth, the standard by which to judge of all systems of faith and doctrine, all forms of church government and modes of worship, the test by which every thing that claimed to be true in religion was to be tried. They believed in Jesus Christ as the true Messiah, the Christ of God, and that all which he taught in the New Testament concerning himself and his system of religion was true; that all the doctrines which he taught were true; that Christ was himself "the way, the truth, and the life." Such was their Christianity and their Protestantism, as was that of most of the New England States; while in the Southern States, the worship of the Church of England had been received with more favor; and they were satisfied with being first Christian and then Protestant, without adding to these the feature of independency. It is not strange that in their constitutions they should in some way show their preferences for Christianity, and for the particular form of Christianity, Protestantism, and also for their particular feature or type of Protestantism. Hence we are informed that, as the colonial period drew to a close, "there were only two colonies in which the civil power did not employ its influence in supporting one or other of the two communions or churches. In New England it gave its support to Congregationalism, or, as it is called in Britain, independency, that being established in all the

Hale v. Everett.

colonies of that province, with the single but small exception of Rhode Island. In the colonies to the south of these, from New York to Georgia, with the exception of Pennsylvania, episcopacy was the favored doctrine." Baird's Religion in America, 184; also Book 2, chaps. 16, 17, 18.

But let us look a moment at the constitutions of the other States in the Union, formed about the same time that ours was, for this may throw light upon the terms we are considering, and show the meaning attached to them at that time. Mr. Bancroft says: "Had the Americans been skeptics, had they wanted faith they could have formed nothing. Let not the philosopher hear with scorn that their constitutions were so completely the offspring of the past, and not the phantoms of theories; that at least seven of them required some sort of religious test as a qualification for office. In Maryland and Massachusetts it was enough to declare belief in "the Christian religion;" in South Carolina and Georgia, in "the Protestant religion, and the divine authority of the Old and of the New Testaments;" in North Carolina, "in God, the Protestant religion, and the divine authority of the Old and New Testaments." In Pennsylvania the test was "a belief in God, the Creator and Governor of the universe, the rewarder of the good and the punisher of the wicked," with a further acknowledgment that "the Scriptures of the Old and New Testaments were given by divine inspiration." Besides this last acknowledgment, Delaware required the officer to "profess faith in God the Father, Jesus Christ his only son, and the Holy Ghost, one God, blessed forevermore." 9 Bancroft's History U. S. 274. 275. He omits to mention New Hampshire and some other States that had a religious test. He then adds: "These restrictions were incidental reminiscences of ancient usages and dearly cherished creeds * * * and for a season, in the States where they were established they created discussions chiefly on the full enfranchisement of the Catholic and the Jew, and they were eliminated almost as soon as their inconvenience arrested attention. At first, the Jew was eligible to office only in Rhode Island, New York, New Jersey and Virginia; the Catholic in these States and in Massachusetts, Pennsylvania, Delaware, Maryland and perhaps Connecticut. But the great result was accomplished from the beginning * * * nowhere was persecution for religious opinion so nearly at an end as in America; and nowhere was there so religious a people." Id. 276.

In the four States in which the Jew was at first eligible to office, according to Mr. Bancroft, no test, either Christian or Protestant, was required. Wherever either of those tests was required, the Jew was excluded. The Christian test admitted the Catholic and the Protestant, while the Protestant test excluded both the Catholic and the Jew. No claim here that the word Protestant, in any constitution of any State, was broad enough to include all but Catholics. No question probably arose concerning pagans, Mohammedans or infidels, from the fact that none openly claiming to be such were elected to office in any of the States where either of these tests was required; or if so, the test was not insisted on, for some special reason. It is very apparent that if Jews could not properly be classed as Protestants, as they were not, neither could pagans nor infidels.

Dr. Baird, in his *Religion in America*, chapter 8, gives a more full and detailed account of the forms of the constitutions of the several States. He states that Virginia is silent upon the subject of Christianity and Protestantism. Rhode Island and Connecticut had adopted no constitutions. They were of Puritan origin, and the charters of both were based on religious principles, and remain as their present constitutions. New York had no test. New Jersey's constitution provided that all persons professing a belief in the faith of any Protestant sect * * * should be capable of being members of either branch of the legislature, and should * * * enjoy every privilege and immunity enjoyed by others, their fellow citizens." Baird's *Rel. in Am.* 248. But there was no disfranchisement of those not "of any Protestant sect," and no test was actually required of any one. 9 Bancroft's *Hist. U. S.* 279, note. Dr. Baird then speaks of the requirements of the several States of New Hampshire, Massachusetts, Maryland and others that we have noticed, and adds—"Such was the character of the State constitutions in the opening scenes of our national existence. Of the thirteen original States, the organic laws of all but one expressly enjoined the Christian religion and, almost without exception, *the Protestant form of Christianity*. * * * I repeat, in few words, that the State governments were founded on Christianity, and, almost without exception, on *Protestant Christianity*. * * * This is the present position of the governments of the several States of the American Union. Their legislation, while it avoids oppressing the conscience of any sect of religionists, is still decidedly

Hale v. Everett.

favorable in general to the interests of Christianity." Baird's Religion in America, 252; 1 Story on Const., book 1. "All the new States, when they cut loose from the mother country, had a favored form of religion which they had adopted as a State religion, or one which they were patronizing, and in their new constitutions they to a great extent endeavored to preserve the same favorite system; but, failing in this, as many of them did, they fell back upon the Christian religion generally or, when they could, upon the Protestant religion, which included all the Christian sects or denominations except Catholics; and these tests were continued in the constitutions of a majority of the original States."

There is no doubt that the same words in the constitutions of the different States meant the same thing, and the same was true concerning the laws that were passed under the different constitutions about the same time. It is said to have been through the influence of Mr. Jefferson that the word Christian or Christianity was not contained in the constitution of Virginia; and in his famous act for establishing religious freedom, adopted by the legislature of Virginia in 1785, which did not contain the word Christian or Christianity at all, but left every one free to believe and worship, or to disbelieve and refuse to worship, as he pleased, it is said to have given him great satisfaction, because it was made to "comprehend within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and the infidel, of every denomination." Baird's Religion in Am., book 3, ch. 3. He evidently understood that a Christian test would exclude the infidel just as much as it would the Mohammedan and the Hindoo. So a Protestant test would exclude all not Christians on one side, and Roman Catholics, who were Christians, on the other side. If Protestantism would include Mr. Abbott in this case, it would of course include Thomas Jefferson, and, by the same rule, also Thomas Paine, whom Gov. Plumer of New Hampshire called "that outrageous blasphemer," that "infamous blasphemer," "that miscreant Paine," whose "Age of Reason" Plumer had read "with unqualified disapprobation of its tone and temper, its coarse vulgarity, and its unfair appeals to the passions and prejudices of his readers." Life of Wm. Plumer, 242, 243. But if Protestantism includes all but Roman Catholics, then Thomas Paine, in writing his "Age of Reason," was preaching Protestantism as truly as Whitefield or Wesley or Edwards while preaching the gospel of the Mes-

siah, the Christ of God; for Thomas Paine and all other atheists, deists, theists and infidels of every stamp, and all pagans, were no more Roman Catholics than were Whitefield, Wesley or Edwards. Mr. Abbott denies that he is a Christian, and so did Jefferson and Paine, and that was honest in all of them, and was the simple truth; and because they were not Christians, they were not and could not be Protestants, as Mr. Abbott truly declares, Protestantism being only one branch of Christianity. Thomas Paine and his followers were neither Christians nor Protestants; neither were the Mohammedans, Hindoos and infidels of Jefferson's time; neither are the theists, the free religionists and infidels of the present day.

It seems unnecessary to examine much further the provisions in the constitutions of the other States. Virginia and New York had no tests; anybody who could get elected, might, so far as religious opinions or professions were concerned, hold any office. Some of the States had simply a Christian test, as Maryland, and there all Christians, whether Catholic or Protestant, were eligible to office. In others, and by far the larger number, there was at first a Protestant test, which only admitted one of the great divisions of Christianity to the exclusion of the other from certain offices. Under neither the Christian nor the Protestant test could a Jew hold any office in this country or in England until the constitutions were amended here, and special acts of parliament passed in their favor in England. 9 Bancroft's Hist. U. S. 275; 1 Black. Com. 375, 449; 4 id. 52, 57, 58, 59, 272.

In England there was the national church which was Protestant, and besides that there were papists and Jews and Mohammedans and infidels and Protestant dissenters. These were all dissenters from the Church of England, and all anti-Catholic, and if the term Protestant included all who were not Romanists, then they were all Protestant dissenters. But such was not the meaning of the word Protestant in England at that time, or at any time since. Protestant dissenters included only such Christian sects as dissented from the church of England, and also from the Roman church. The edicts of the government were against Jews, pagans, Turks, infidels, papists and Protestant dissenters, showing that the term Protestant did not include infidels, any more than it did Turks and pagans.

In England, formerly, Unitarians were not recognized as a sect of Christians, because their faith was prohibited by law. They

Hale v. Everett.

were then classed as a kind of infidels, and so long as they were not reckoned as Christians, they could not properly be reckoned as Protestants. *Drummond v. Attorney-General*, 2 Eng. Law & Eq. 15, was a case decided in the House of Lords in 1849 or 1850, where one question was, whether Unitarians were Protestant dissenters or not. It was admitted that they were and always had been dissenters from the church of England, and that they were not and never had been Catholics. But it was expressly held, that while they were not recognized as Christians, they could not be Protestants; that to be Protestant dissenters, they must be first Christian dissenters; and, second, that they must not only be Christians, but anti-Catholic. To be Protestant dissenters, they must be Christian as well as anti-Catholic dissenters from the English church. This case covers the ground from 1710 to 1850, and shows that such and such only was the meaning of the word Protestant in England during all that time.

In 1835 the State of North Carolina amended her constitution. Before that time, she had a Protestant test similar to that in our constitution, under which none but Protestants could hold certain offices in the State. The people wished to enlarge this test so as not to exclude Roman Catholics, but they did not therefore propose to abolish the test altogether, so as to allow Jews, or pagans, or infidels, to hold these offices; so they substituted the term Christian instead of the word Protestant. By this amendment all Christians are admitted to these offices, whether papists or Protestants, whereas under the old, only Protestants could thus be admitted; but neither admits, nor was intended to admit, anybody but Christians.

But it is claimed that soon after the formation of our constitution of 1783, William Plumer was elected representative from the town of Epping, and was afterward elected as senator and governor of the State, all which positions he was allowed to hold without objection on account of his religious views, while it is claimed that he was a deist, a disbeliever in Christianity, and because he was allowed to hold his seat, and was not forcibly ejected because of his religious belief, or want of religious belief, that therefore he must have been a Protestant within the meaning of the constitution, and therefore that the term Protestant as there used must have been intended to include all others except papists.

It would seem to be a sufficient answer to this position to state,

what everybody knows, that many Roman Catholics have been elected as members of the house of representatives and to other offices within the limit of this test, and have always been allowed to hold their seats without objection. Now it is claimed that the Protestant test was introduced to prevent Roman Catholics from holding these offices, and we have no doubt it was intended to prevent them, with all who did not give their general assent to the doctrines of Christianity, from holding office; that is what we claim, and if the fact that many Roman Catholics have been allowed to hold seats in our legislature without objection does not prove that the term Protestant in the constitution does not mean anti-Catholic, which no one claims, then why should the fact that one deist was allowed to hold his seat there be held to prove that the same term in the same instrument does not mean anti-deistical? If many exceptions on one side are admitted, as they are to prove nothing as against this rule, why should it be claimed that a single exception on the other side overthrows the rule itself, and that this single exceptional case must be taken to establish the rule in its favor for all time?

We have no doubt that William Plumer himself understood the term Protestant, in the constitution, to mean just what the majority of the court hold that it means, and that everybody in his time understood it in the same way. We form these conclusions from an examination of the life of Governor Plumer, as written by his son, who was well known to many of us personally, and whose ample means of knowledge in relation to the facts stated cannot be questioned.

In speaking of the proposed constitution of 1779 (Life of Wm. Plumer, 49), the author mentions the fact that that constitution made the "professing the Protestant religion" a necessary qualification of a voter, as well as a test for holding office in the State. This religious test for voting was then first introduced in that constitution, and was not included in any of the subsequent ones; and the reason of this is stated in the life of Mr. Plumer: "It is worthy of remark that this religious test, then first proposed, was nearly contemporaneous with the alliance with France, which, however beneficial in other respects, was thought by many likely to favor the introduction of popery among us." But, as we have before seen, this constitution of 1779 was not adopted.

"Another convention was called in 1781, and the constitution

proposed by it, after various alterations and amendments, went finally into operation in 1784. * * * It was provided that no person should hold the office of governor, councillor, senator, delegate, * * * unless he were of the Protestant religion. It was in opposition to these intolerant restrictions, and in defense of religious liberty," that Governor Plumer's first essay was written. "In it the broad principle is laid down that all men are equally entitled to the protection of the laws, who demean themselves peaceably as good members of civil society, without reference to their religious opinions; and that any man should be eligible to office who possesses the ability necessary to the discharge of its duties." "This communication, which went the full length, not of toleration merely, but of religious freedom, as now understood by its most liberal advocates, was far in advance of the times." "The printer," my father writes, "thinking the religion of the country required such a provision, as I opposed, refused to publish what I had written until I paid him three dollars for it." *Life of William Plumer*, 50, 51.

He adds, "The articles of the constitution thus opposed were adopted by the people, and still remain a part of that instrument. Such, however, was the justice of his strictures, and such the advance of public sentiment on this subject, that these provisions soon became practically obsolete. Men not Protestants, nor even Christians, have been repeatedly chosen to offices which, under these provisions, they were not entitled to hold, and no attempt was ever made to exclude them on the ground of their religious disqualifications." *Id.* 51.

In 1785, William Plumer was elected representative to the legislature from Epping, and was frequently re-elected to the same body between the years 1778 and 1801, and for two years was its speaker. He was a member of the constitutional convention of 1791, which framed our present constitution. In 1810 and 1811, he was a member and president of the State senate. In 1812 he was elected governor, and again re-elected in 1816, 1817, and 1818. *Id.* 337, 338. On his first election, in March, 1785, "his religious opinions had been urged against him in the canvass, and he was told that his seat would be contested on the ground that he was not of the Protestant religion. But no such objection was made to him, and he held his seat during the three sessions the legislature held that year." *Id.* 59. It is not suggested that Mr. Plumer ever

contended or claimed, at any time or anywhere, that the fact that he was a deist (if such was the fact) would not be a disqualification for the office, under the provisions of the constitution, if insisted on. He did not understand that he could be a deist and at the same time be "of the Protestant religion," within the meaning of the constitution. He admitted that a knowledge of theology and a belief of the truth might be necessary for a religious teacher, but not for the civil ruler or the magistrate, who needed much more to know something of the principles of government and of political science; and that the error in the constitutional requirement was, that it required a *religious* qualification for a *civil* office.

He did not understand that he, as a deist, or that any deist, would be included within the words Protestant or Christian, as used in the constitution; but he seems frankly to admit that he is neither of these. There is no doubt that his son had special reference to his father, where he says, as above, that *men not Protestants or even Christians*, have been repeatedly chosen to offices which, under the provisions of the constitution, they were *not entitled to hold*. But why not entitled to hold? Simply because they were not Protestants, as the constitution required they should be. He evidently was not referring to Catholics, because they were Christians, though not Protestants; but he is speaking of those who *were not Protestant, nor even Christians*. We cannot doubt that the author of the Life of William Plumer, being at the same time his favorite son and most intimate friend, understood fully and perfectly his father's views upon these subjects, and that he has, in these expressions, fairly and truthfully represented them.

But let us see whether there was any good reason why there was no objection made to Mr. Plumer in 1785, even though he was constitutionally disqualified for the office to which he was then elected. When about twenty years of age, in May, 1779, after some weeks of the most intense religious excitement, he became a convert to the doctrines of the Calvinist Baptists, under the preaching of Dr. Samuel Shepherd, the third Baptist preacher ever ordained in the State. From a convert, he became at once an exhorter, and then a preacher. In one year from the time of his supposed conversion he started on a preaching tour through the State, in which he spent some six weeks, and he continued preaching some six months in all. But by the autumn of 1780 a thorough reaction had begun in all his religious feelings; from unlimited faith, he went to the

Hale v. Everett.

opposite extreme of almost universal skepticism, which ended in deism. By the commencement of the year 1781 he was a confirmed skeptic, and for a short time seemed disposed to advocate these new opinions, as he had the old, before. But, as before, he soon tired of this new excitement, and concluded that the best way was to let every man look after his own religious opinions and religious faith; and that, as for himself, he had better devote himself to his farm, and the study of the law, and the practice of politics; and this he did.

His son says of him, "The strength of his earnest and confiding faith filled, while it lasted, all his thoughts, and directed the whole energy of his mind to the inculcation of his religious opinions, and with them, as he believed, to the promotion of the highest happiness of his fellow men. But this confiding faith, and more than missionary zeal, were not destined long to continue. A new train of thought and feeling had now arisen, which mastered him as effectually as his former mood, with results more lasting, and, in some respects, less fortunate. * * * The revulsion of thought and feeling was as far, or farther, on the other and the wrong side of a just balance of opinion and sentiment. Driven into the extreme of fanatical belief, under the excitement of fear and the contagion of example, he was carried by a natural but unfortunate reaction into the opposite extreme." Id. 34

"In the first ardor of his change, he sought for a time to make converts to his new opinions. He was, as Macintosh says of himself, 'probably the boldest heretic in the county.' But he soon relinquished the vain ambition of settling the opinions of others while his own were in a state of so much uncertainty. His feelings were those of an inquirer in doubt as to truth, and anxious chiefly for the solution of that doubt. When he spoke upon the subject, it was therefore not with levity or sarcasm, but with the respect due to long-established opinions, and in the tone of inquiry rather than of dogmatic defiance and disbelief." Id. 40.

It seems as though at first an open and pronounced deist, his ardor soon cooled down, and he came into the condition of an *inquirer after truth*, speaking *not with levity or sarcasm*, such as would be likely to offend any one, but *he showed respect for long-established opinions*, and his tone was that of *inquiry and not of defiance or disbelief*. He had learned to conciliate the good will and good opinion of those about him, and the course he pursued

was calculated to make him friends in all circles and denominations, and to disarm and conciliate those who had otherwise been enemies. Again, we must recollect that the country had just passed through the period of the revolutionary war, and that young Plumer had all along been an ardent patriot and a preacher of liberty (*Life of Plumer*, 44), and had only been restrained from enlisting in the army and marching to Boston at the battle of Bunker Hill in 1776, then only in his seventeenth year, by his father's direct prohibition (*id.* 45.); that he had ever been ready to suffer chains and imprisonment as a martyr to the cause of his country, if such should be his lot (*id.* 44, 45); and that in these views he agreed with or led almost the entire community in the State (*id.* 45). Such a young man could not fail to be popular among his associates; and though, in 1785, when he was about twenty-six years of age, some five years after his fiery zeal as a Baptist had burned and cooled, and some four years after his like fiery zeal as a deist had blazed and then gone out, and some three years after he had assumed the tone of *inquiry* alone, had dropped his sarcasm and had become accustomed to speak of the religious views of others with that respect due to long-established opinions; though at that time there were some who threatened to object to him on the ground of religious belief, or want of religious belief, yet, by the course described above, he had disarmed nearly all opposition, and even these faint threats were never carried into execution.

Another reason why no objection was made to Mr. Plumer was that no political parties had at that time been formed, and the rancor and bitterness of political parties were then, to a great extent, unknown in this State. The only parties then known in the State or country were whigs and tories, but in New Hampshire nearly all were whigs; "there was no considerable tory party here." *Life of Plumer*, 45. So, that while young Plumer had been for some years pursuing a course calculated to conciliate all parties in religious matters, he belonged to a political party which embraced nearly all the citizens of the State, and the question was not then so much upon religious subjects as upon subjects of civil government. He had been a true friend to his State and country during the revolutionary war, and was now ready to aid in the making of laws in conformity to the new constitution which had gone into operation the year before, in which the Protestant cause had received such encouragement as its friends thought proper and desirable. Under

Hale v. Everett.

these circumstances, it is not strange that a young man of promise and known patriotism should be suffered to hold his seat in a body of men nearly all of whom agreed with him in political sentiment, so far as any political sentiment had been developed in the State.

But let us look a little further at the acts of Mr. Plumer. As we have seen, he was a member of the constitutional convention that sat in 1791, which formed the constitution of 1792, which is still in force. There is but little reported in the journal of proceedings of that convention, and that little has not been published. But in the Life of Governor Plumer, his son has been able, as he says, partly from the journal and other papers of the convention, and partly from his father's papers, to give some account of these proceedings, and of his father's connection with them. "On the subject of religion, he proposed, instead of the former provisions," an article considered by him much more liberal. "This amendment," he adds, evidently expressing the views and opinions of his father as well as his own upon that subject, "was wide enough to embrace the Roman Catholic on the one hand, and the deist on the other." Id. 116.

That would be, as he understood it, enlarging or extending the existing Protestant platform, as contained in the constitution of 1783, and which remains unchanged to this time, by putting an addition upon each side of it. On the one side it would be extended so as to admit the papist, so that it might embrace all the Christian sects, Catholic and Protestant; and upon the other side, the platform was to be enlarged so as to admit the deist, the disbeliever in the whole system of Christianity, and the advocates of all other systems opposed to Christianity. Governor Plumer evidently understood that a Protestant platform would no more hold a deist than it would a Roman Catholic; that to hold either it must be enlarged or changed, so that it could no longer be a Protestant platform. He evidently understood that deists were not included in the meaning of the word Protestant in the constitution, any more than papists were. But this amendment was defeated in the convention, and the constitution in that regard remained unchanged.

The same writer adds: "A motion made by my father to abolish the religious test for office-holders, who were required by the constitution to be 'of the Protestant religion,' though at first rejected,

was finally adopted by the convention. It failed, however, with the people, receiving a majority of the votes in its favor, but not the two-thirds necessary for its adoption. This test still forms a part of the constitution. The convention of 1850 twice proposed, almost unanimously, its repeal; but the people refused, by very large majorities, to make the proposed alteration." Id. 117, 118.

In the convention of 1850, Judge Woodbury made a speech in favor of removing the test in the constitution, in which he spoke of it as having been inserted in the constitution of 1783 in consequence of some fears or taunts that, after the French alliance, there was also to be an alliance with the French religion—the Catholic. He only speaks of it, however, as the traditionary cause, and thinks the tradition may have come to him from Governor Plumer. 1 Woodbury's Writings, 486.

But this tradition had reference to the provisions of the proposed constitution of 1779, instead of that of 1783, as has been already stated in the quotation from Mr. Plumer. The French alliance was formed early in the spring of 1778; Franklin and the other commissioners from this country were presented to the king of France, March 20, 1778; and the alliance was soon completed, so that in April of the same year the news of the treaty between France and the United States had spread throughout Europe, and of course through this country. 9 Bancroft's Hist. U. S. 489, 497. And in the summer of 1778, in July, a French fleet appeared on our coast to aid us in the contest with Britain. Whiton's Hist. N. H. 140; Belknap's Hist. N. H. 376. At that time and immediately after, these fears of French Catholicism prevailed, as Mr. Plumer states; and this is evidently the only tradition of that kind that ever came to the ears of Judge Woodbury from Governor Plumer or anybody else, for long before 1783 everybody had learned, as the history of the times fully proves, that the fear to our religion was not from French Catholicism, but from French infidelity. "The only real danger from the French alliance to the religion of the country was not from the primate of Rome, but from the philosopher of Ferney, whose disciples in the French army were much more numerous and more zealous than the priests." Life of Wm. Plumer, 50. We are also assured, upon the best of authority that whatever the fears may have been in 1778 and 1779, when the French alliance was first formed, its real effect was very powerful in diminishing the prejudices against Catholicism that had existed

before. 3 Hildreth's Hist. of U. S. 385. Hence we see that these fears may have induced the convention that framed the proposed constitution of 1779 to insert the article requiring all legal voters to be Protestants, but before 1783 such fears were all dispelled, and instead of fears of Catholics, the fear of French infidelity had taken its place, which was the great thing to be guarded against; and especially if that provision in the constitution of 1783 had crept into it from any such cause as fear of Catholicism, it would have been omitted in the constitution of 1792, when that cause and all similar causes had ceased to operate: but this was not the case. In fact, it is by no means certain that had Governor Plumer, in the convention of 1791, proposed to substitute a *Christian* test for the *Protestant*, instead of abolishing all tests, he might have obtained, not only the assent of the convention, but the two-thirds vote from the people, which was necessary to adopt it. For there is no doubt that at that time, as well as in 1783, the people of this State had much greater fears of infidelity than of popery. The people would probably have been more unwilling to have consented to the proposed enlargement of the Protestant platform on the side of deism than on the side of Romanism.

A short extract from an article that was printed in the *N. H. Gazette* of April 20, 1786, in relation to Major-General Sullivan, will, perhaps, as well as any thing, indicate the true State of feeling in this State at that time. The article is signed "A friend to justice." General Sullivan had been accused, it seems, of being one of a party of three, who had, at a Mr. Brewster's, at Portsmouth, treated with contempt and ridicule the Christian religion and the sacred Scriptures. In justification of General Sullivan, the writer says, "To suppose him to be one of those who joined in reviling the sacred writings is most unjust and ungenerous. It is a fact, well known to all who have the pleasure of an acquaintance with that gentleman, that he has ever been a zealous and able advocate in favor of the divinity of the Scriptures, and particularly of the truth of the Christian system. It is well known to a number of worthy officers who served under him, that, while the army which he commanded in 1779 lay at Wyoming, he wrote a most learned and ingenious treatise against the deists, which was highly applauded by all the chaplains in that army, among whom was the Rev. Dr. Evans, then chaplain to the New Hampshire troops. And even those who professed to be deists acknowledged that it con-

tained the most powerful and conclusive arguments in favor of divine revelation and the system of Christianity they had ever seen. This piece, though many copies of it were given out, he would not consent to have published, lest it should be said he was acting out of his sphere. I remember sometime the last fall to have heard a number of persons, among whom was Mr. James McGregore, son of the late Rev. Mr. McGregore, say that, in a dispute with some gentlemen who professed deism, he argued with such clearness of reason upon the Scriptures as at once silenced his adversaries, * * * and I heard the Hon. Judge Calfe since observe, that he (Sullivan) was the most powerful antagonist, and used the most convincing arguments against the deists, he ever heard. How malicious then and cruel must it be for persons to whisper that he was one of the impious club who so daringly blasphemed the sacred Scriptures and the Redeemer of mankind." The writer then states that the above facts in relation to General Sullivan are within his own knowledge, and that they are stated so as to open the door to inquiry, so that any person may satisfy himself of their truth.

It would seem that there would be no great difficulty in ascertaining the truth of the above statements, since the individuals mentioned were all well known in that portion of the State at that time. But it is evident that at that time, if any false slanders were to be *whispered* against any one, designed to his injury, it would be that he was a deist, and not that he was a Catholic, so much stronger was the prejudice against the former than the latter. It also tends to show that the religious discussions in the army, in 1779 and after, were not upon the subject of the papacy, but upon French infidelity. General Sullivan was vindicated against all such false charges, or *whisperings*, by being elected president of the State in 1786, and also in 1787, and again in 1789. Whiton's Hist. N. H. 155, 160; Jenks' N. H. Political Manual for 1868, 34, 35. General Sullivan was also chosen president of the New Hampshire convention which ratified the Federal constitution in 1788, and Hon. John Calfe (the Judge Calfe mentioned in the above article) was chosen its secretary, and he was also secretary of the State constitutional convention of 1791. Whiton's Hist. N. H. 158, 163, 164.

It is evident, we think, that the Protestant test was not introduced into the constitution of New Hampshire on account of any particular fear of the Catholics, for there was no occasion to fear

them at that time, or probably at any time since then, in this State ; but, more particularly at that time, they were not numerous enough to cause any alarm. For two hundred years after New Hampshire was settled, from 1623 to 1823, there were no Catholics in the State, or next to none. For forty years after the constitution of 1783 was adopted, there was no church or society of Catholics in the State, so far as we have been able to learn ; for in 1822, "*for the first time*, an attempt was made to introduce into New Hampshire the principles of the Roman Catholic church. The Rev. Dr. Barber, who had passed some time at Rome, was ordained at the Catholic chapel, in Boston, as a Catholic missionary to this State ;" and between that time and 1833 he had succeeded in collecting "a small society at Claremont," and "another * * * at Dover." Whiton's Hist. of N. H. 193.

The only man we find of any account, who ever had or pretended to have any suspicions of danger from the Romanists in those days, was Edward Gove, of Hampton, who, in 1683, excited a rebellion against the government of Edward Cranfield, and, among many other things equally absurd, he charged upon the governor a design to "bring popery in amongst them." But upon being arrested, he was indicted and tried for high treason before Richard Waldron and others as judges, was convicted and sentenced to death, but was finally sent to England and imprisoned in the tower of London. Belknap says : "Gove, in his petitions to the king, pleaded 'a distemper of mind' as the cause of his actions for which he was prosecuted. He also speaks in some of his private letters of a drinking match at his house, and that he had not slept for twelve days and nights about that time. When these things are considered, it is not hard to account for his conduct. From a letter which he wrote to the court while in prison [at Portsmouth, and before trial], one would suppose him to have been disordered in his mind." Belknap's Hist. N. H. 99, 100, and note ; Appendix to same, No. 33, p. 465 ; 8 N. H. Hist. Coll. 168, 171. Probably no man, who was not either insane, or drunk, or both, as Gove seems to have been, ever had any great fears of the Romanists in New Hampshire, until 1778, when some fears arose from the French alliance, which fears had their effect, as we have seen, upon the convention, which framed the proposed constitution of 1779. But these fears were soon dissipated, and the real cause of fear was soon discovered to be in the opposite direction, as Mr. Plumer

says, from French infidelity ; and this was well understood when the constitution of 1783 was formed, and continued so until 1792, when our present constitution was adopted. Thus we see that in 1779, when there were vague fears of Romanism, the Protestant tests were retained because Protestantism was known, on the one hand, to be anti-Catholic ; and when there were real and well-grounded fears of French infidelity in 1783 and afterward, the same Protestant test was still preserved unchanged, because Protestantism, upon the other hand, was equally well known and understood to be anti-infidel, being first Christian, and then anti-Catholic. Prior to the formation of the constitution of 1783, there had been far more fear of a hierarchy of some other kind than there was of the Catholics, and at the time of its formation there was far more fear of French infidelity than of all the rest.

When the constitution of the United States was adopted in 1788, no religious test was incorporated into it, and the first amendment that was adopted was, that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. 2 Curtis' Hist. of Const. 629 ; 1 Story on Const., § 278 ; 2 Story on Const., §§ 1870, 1871. "Thus," says Judge Story, "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions ; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the infidel, may sit down at the common table of the national councils without any inquisition into their faith or modes of worship." 2 Kent's Com. 35-37 ; Rawle on Const., ch. 10 ; 2 Story on Const., § 1879.

"The real object of the amendment was," says Judge Story, "not to countenance, much less to advance, Mohammedanism or Judaism or infidelity by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the apostles to the present age." And again he says, "Probably at the time of the adoption of the constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought

Hale v. Everett.

to receive encouragement from the State, so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of State policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 2 Story on Const., §§ 1874, 1877.

We think it will be evident to any one who will read Judge Story's Commentaries on the Constitution, from § 1870 to § 1880, that he understood the term "Christian," as used in the State constitution, and at the time of their adoption, to mean simply those who believed in or assented to the truth of the religion of Jesus Christ, as taught in the New Testament; that he understood the terms "Catholic and Protestant" as designating the two great subdivisions of Christianity, and that a man could no more be a Protestant unless he assented to the truths of the Christian system than he could be a Roman Catholic without such assent. Montesquieu says: "When the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the north embraced the Protestant, and those of the south still adhered to the Catholic." Montesq. Spirit of Laws, book 24, ch. 5.

The framers of the constitution have stated plainly and fully the reasons for placing that test in the constitution; they have not left these reasons to be ascertained by conjecture, or to be supplied by the imaginations of their descendants; and not only the framers of the constitution, but all the people of the State, in adopting the constitution, have adopted the reasons for this Protestant test, which are stated at length in the constitution. Judge Story says that at that time "the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State." And most of the States, among which was New Hampshire, considering Potestantism to be the best form of Christianity — considering Protestantism to be, in the language of the constitution, "evangelical" Christianity, they chose that form of the Christian religion instead of Christianity generally, which would have included both the Protestant and Catholic forms. Such was evidently the nearly universal sentiment in New Hampshire when the constitution of 1783 was adopted. The printer of the *N. H. Gazette* only echoed the general public sentiment, when he refused to print Mr. Plumer's first essay without pay because he

thought "the religion of the country required such a provision" as the religious test; and the same was true in 1791, when Mr. Plumer proposed his amendment, which was designed, not to help the papists merely, by striking out the word Protestant and inserting the word Christian as they did in North Carolina, but by striking out the word Protestant and not substituting any thing in its stead, so as thereby to admit deists and other anti-Christians, as well as papists. But the people were by no means ready to give up the idea that what they believed to be the true "evangelical" religion, Protestant Christianity, should receive encouragement from the State.

There is no doubt that the language of the constitution is to be understood in the sense in which it was used at the time when it was adopted. Opinion of Justices, 41 N. H. 551; id. 44; id. 635; Cooley's Const. Lim. 66. And in interpreting clauses, whether of constitutions or of statutes, we must presume that words have been employed in their natural and ordinary meaning. Cooley's Const. Lim. 58; 1 Story on Const., § 453. In written constitutions, "the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated." Cooley's Const. Lim. 58, 79. "The framers of the constitution," says MARSHALL, C. J., "and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant." *Gibbens v. Ogden*, 9 Wheat. 188.

And Mr. Cooley, speaking of the provisions in the State constitutions on the subject of religious liberty, marks their wide differences—"some of them being confined to declarations and prohibitions designed to secure the most perfect equality before the law of all shades of religious belief; while some exhibit a jealousy of ecclesiastical authority by making the persons who exercise the functions of a clergyman, priest or teacher of any religious persuasion, society or sect, ineligible to civil office; and still others show some traces of the old notion, that truth and a sense of duty are inconsistent with skepticism in religion." Cooley's Const. Lim. 468. He cites as instances where this "old notion" prevailed, the constitutions of Pennsylvania, North Carolina, Mississippi, etc., and might have cited Massachusetts and New Hampshire. Blackstone notices this "old notion," when he says that "all moral evidence, therefore, all confidence in human veracity, must be

weakened by apostasy and overthrown by total infidelity. 4 Black. Com. 44.

It seems that this "old notion" was very prevalent in New Hampshire and Massachusetts, and the other New England States, namely: "that truth and a sense of duty were inconsistent with skepticism in religion," and, therefore, they required that their civil officers, at least in New Hampshire, should be of the Protestant religion, not so much that it was anti-Roman Catholic, as because it was Christian, and that particular form of Christianity that they believed to be true, pure and evangelical.

Another principle of construction should be here stated. In ascertaining the meaning of any provision of a constitution or law, the general object of it, and the danger which was apprehended, and against which the constitutional or legal provision is intended as a guard or barrier are to be considered. Cooley's Const. Lim. 65; *Concord Railroad v. Greeley*, 17 N. H. 63; *Moore v. Taylor*, 44 id. 374-5; *Underhill v. Manchester*, id. 220-1, and cases cited; *Barker v. Warren*, 46 id. 124; *Dartmouth College v. Woodward*, 4 Wheat. 628-9.

It is evident that the evil to be guarded against in the minds of the framers of the constitution was not Romanism, else they would have said so plainly. There was no cause to fear that at that time. But what they then feared was *immorality* and *impiety*, and for the reason that these would destroy the security of government by destroying in the hearts of men, in the hearts of the subjects of that government, the obligations to due subjection. Here is the "old notion" plainly visible, as stated by Blackstone, that "all confidence in human veracity must be weakened by apostasy, and overthrown by total infidelity;" or, as stated by Cooley, namely, that "truth and a sense of duty were inconsistent with skepticism in religion." In other words, that a person who did not believe in the Christian religion — a skeptic, an infidel — could have no proper regard for truth, no proper views of the sacred obligations imposed by an oath, no proper sense of duty, or of obligation to the civil government, any more than he would be likely to have of his duty and obligations to God, in whom he did not believe; and hence, in their view, the necessity of encouraging the Christian religion, and requiring that all their important and most responsible officers of State should be of the Christian religion, as in Massachusetts, or of the Protestant religion, as in New Hampshire, and

for the reason, as stated in the New Hampshire constitution, that Protestantism was, in their view, evangelical Christianity.

The danger to be avoided or guarded against, then, is *immorality* and *impiety*; the objects to be secured are "*morality* and *piety*, rightly grounded on evangelical principles" (Art. VI, Bill of Rights); that is, a morality and piety grounded upon the principles of the gospel of Christ. They believed that such morality and such piety would "give the best and greatest security to government," and would lay in the hearts of men the strongest obligations to due subjection;" and as the knowledge of these (that is, morality and piety, rightly grounded on evangelical principles) is most likely to be propagated through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion," *therefore*, the legislature is empowered to authorize towns and religious societies to support public Protestant teachers of piety, religion and morality.

Here is, first, a plain statement of the objects desired to be gained; second, the reasons stated why those objects are desirable; and, third, the way and manner in which these objects are likely to be attained; and then follows the provision that such means may be provided for, under this constitution, as will be most likely to secure the desired object, to accomplish the end in view. For the reasons therein stated they desired to secure a system of morality and piety for the people of this State; but that was not all. They wished for a system of morality and piety "*rightly grounded upon evangelical principles*," upon the principles of the gospel of Jesus Christ, which must be Christian; and to secure that result, as the means most likely to accomplish that object and best adapted to that end, the support of Protestant teachers of piety, religion and morality was authorized, and the Protestant tests were introduced in regard to office-holders. The reason why the framers of our constitution, and the people who adopted it, preferred Protestantism as the favored religion of the State, was, that they believed it to be not only Christian, but that it was most purely and intensely and exclusively Christian, the most *evangelical* of all the known subdivisions and forms of Christianity. They chose Protestantism, not so much because it was anti-Roman Catholic, as because they believed it to be *true in itself*, founded upon the gospel of Christ alone, *evangelical*, a pure Christianity, stripped, as they supposed, of all the traditions of men and of every human device and inven-

tion, founded alone upon the Bible as the word of God; and because they believed Protestantism to be that system of morality and piety founded upon evangelical principles, which gave the best and greatest security to government, and laid in the hearts of men the strongest obligations to due subjection. This was what they wanted, and all they wanted, and these were the reasons why they wanted it, and this was the way in which they proposed to secure it, all fully and plainly stated in this article in the bill of rights. Not a word about Catholics or Romanism.

And here another principle of construction comes in with authoritative force, which would seem conclusive on this subject, viz., "When we once know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. Great caution should always be observed in the application of this rule to particular given cases; that is, we ought always to be certain that we do know and have actually ascertained the true and only reason which induced the act. It is never allowable to indulge in vague and uncertain conjectures, or in supposed reasons and views of the framers of an act, where there are none known with any degree of certainty." Cooley's Const. Lim. 65; Smith on Stat. and Const. Construction, 634.

In the case before us we know the reason why the framers of the constitution made provision for Protestant teachers of religion, and why they prescribed the Protestant test for office-holders, because they themselves have informed us fully on that subject. There is no room for doubt or for cavil. It was not solely because Protestantism was anti-Catholic. If that had been the reason, it would have been fully and plainly stated. But it was that they might secure to the State and its inhabitants "morality and piety, founded upon evangelical principles," the principles of the gospel of Jesus Christ, the principles of true Christianity. This was what they sought, as they have fully and plainly stated, and also given us fully the reasons why they desired it, and the manner in which they expected and intended to secure it.

There is no occasion here for the great caution spoken of in the rule, for that is to be exercised only when the reasons are not known. And if it is never allowable to indulge in vague and uncertain conjecture, or in supposed reasons and views of the framers of an act,

when there are none known with any degree of certainty, what ought to be said of the impropriety of indulging in vague conjecture, and in supposing reasons to exist which are not only not the ones given by the framers of the act themselves, but which are directly in conflict with those that are given? What shall be said of the injustice of an utter perversion of all rules of construction, when we are called upon to ignore all the reasons which the framers of the constitution have given as the grounds of their action, and to substitute other supposed and conjectural reasons, which the framers did not give or in any way allude to, and which are utterly inconsistent with those that are given? This can never be allowed until we are prepared to convict the framers of the constitution, and the people who adopted it, either of not knowing the reasons upon which they did act, or of not having sufficient intelligence to state them fairly, or of having intentionally stated them falsely.

The remarks of BRONSON, J., in *The People v. Purdy*, 2 Hill, 36, 37, are in point here. He says: "In this way a solemn instrument — for so I think the constitution should be considered — is made to mean one thing by one man, and something else by another, until in the end it is in danger of being rendered a mere dead letter, and that, too, where the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we first lose sight of the instrument itself, and allow ourselves to run at large in the boundless field of speculation. For one, I dare not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value if their injunctions may be thus lightly overlooked, and the experiment of setting a boundary to power will prove a failure. We are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language. * * * We have here not only the unequivocal language of the constitution itself, but the declared will of the framers of that instrument in another form, * * * and this fundamental law has not yet been repealed, unless it has been brought about without the consent of the people who adopted it. I will not inquire whether the provision be a good one or a bad one; whatever may be my views on that subject, I am not at liberty to set up my opinion against the declared will of the people, as manifested in the supreme law of the land."

To whatever source we look for authority, as to the meaning of

the word "Protestant" in our State constitutions, we find but one response. All the authorities teach us that it means, first, Christian, and second, anti-Catholic; that no man can be a Protestant unless he first assents to the truth of Christianity; that Christianity has become divided into two great subdivisions in western Europe and America—the Catholic and the Protestant; that a man can be neither a Catholic nor a Protestant, unless he is first a Christian; that the term Roman Catholic means, first, a Christian, and second, a papist; while the term Protestant means, first, a Christian, and second, an anti-papist; that no man, unless he assents to the truth of the Christian religion, as taught in the New Testament, can properly be called either a Catholic or a Protestant; and that the term Protestant, as used in our constitution, does not include the believer in Judaism, the Mohammedan, the pagan, the atheist, deist, theist, free religionist or any other class of infidels, who deny the truth of the Christian system as taught in the New Testament. 1 Hallam's Const. Hist. of Eng., ch. 2 (Reformation); 2 May's Const. Hist. Eng., ch. 12 (Religious Liberty); 7 Lingard's Hist. Eng. 384; 1 Motley's Rise of Dutch Republic, 484; 2 id. 490; 1 Froude's Hist. Eng. 130, 174; 2 id. 32, 34, 36, 71; 6 id. ch. 33; 7 id. 23, 24, 73, 74; 10 id. 4; 2 Macaulay's Hist. Eng. 168, 172, 180; 3 id. 39, 113, 153, 154, 166, 488, 489; 4 id. 305, 306, 307; 3 Hume's Hist. Eng. 132, 233, 370; 4 id. 10, 11, 29, 147, 148, 157; Smiles' Hist. of the Huguenots, 71, 78, 110, 113; Mackintosh's Hist. Eng. 319, 334; D'Aubigné's Hist. of Protestant Church in Hungary, *passim*; Marsh's Hist. of Protestant Reformation in France, *passim*; 1 Bancroft's Hist. of U. S. 276, 277, 281; 2 id. 456; 4 id. 277, 279, 280; 5 id. 1; 9 id. 272, 274, 276, 278; 2 Story on Const. U. S., §§ 1871, 1872, 1873, 1876, 1877, 1878; 2 Tytler's Universal Hist., ch. 20.

I have thus, perhaps, at too great length, adduced authorities and arguments to sustain the views of the majority of the court as to the meaning of the words Protestant and Christian as used in our State constitutions; not so much that the decision of this cause depends upon this particular view, for the decision of the cause must be the same, as will readily be seen upon the facts found in this case, whatever meaning we may attach to these words in the constitution; but it is rather to meet some of the arguments of the dissenting opinion in this case, the result in which, as will be seen, can only be reached and the conclusions in which can

only be sustained, by holding that the term Protestant in the constitution means simply anti-Catholic, and hence that it will include deists, theists and infidels, and Turks and pagans as well; and that the term Christian, as used in the constitution, has no particular reference to Christianity as a system of religion, but was intended to embrace all men who were moral and upright in their lives as well Mohammedans, pagans and infidels, as those who assented to the truth of the doctrines of Christianity. The majority of the court are clearly of opinion that these views, however ingeniously or forcibly stated, are, in the main, erroneous and radically wrong, and have stated a few of the reasons and grounds upon which our conclusions are based.

We rejoice that our constitution has not made the rights of conscience to depend upon differences of religious opinion, but has established those rights upon a firm, a broad, a just and an enduring basis; and although the Protestant test was introduced as a qualification for some civil officers, yet no case has yet arisen, and there is probably little fear that a case ever will arise, where this religious test has been or will be applied, to exclude any person from an office to which he is duly elected, and for which he is in other respects qualified. These tests have always been, in fact, a dead letter, and the only regret is that they have not been long ago removed by amendment, so as to free our constitution from this just objection; so that it should require only the qualifications of talent and integrity, of honesty and ability, for any civil office, and leave it for churches and other religious organizations to decide upon questions of religious faith and the doctrines of theology.

In the dissenting opinion, the old question in relation to original sin and to the future punishment of infants is sought to be again revived, after a comparative rest of forty years or more. These questions seem to us to have very little to do with the questions at issue in this case. It is said in the opinion that "the Calvinistic doctrine of predestination, whatever it originally was in general principle, and however it was applied to infants or adults, has been rejected or transformed in Calvinistic churches since the time of Calvin." To a certain extent we may assent to that proposition. It has been denied that Calvin or St. Augustine, whom Calvin seems to have followed in his form of statement of the doctrines of "original sin" and of "predestination," either of them, absolutely taught the doctrine of "infant damnation," yet that they carried

the doctrine of "original sin," at least in its statement, much further than the Calvinists of the present day, or any for the last hundred years have done, is not questioned. See Dr. Lyman Beecher's letters, published in 1828, *Spirit of the Pilgrims*, vol. 1, pp. 42, 78, 149. In the first letter, he claims that the "future punishment of infants is not a doctrine of Calvinism;" in the second, that this doctrine was "never a doctrine of the Calvinistic churches;" and, in the third, that "this doctrine is neither believed nor taught by the Calvinists, as a body, at the present day." In the first and second letters, he takes up the passages substantially as quoted in the dissenting opinion in this case, from St. Augustine, from Calvin, from Edwards and Bellamy, and from Dr. Twiss, "the prolocutor of the Westminster assembly," and Dr. Gill and others. He also examines the different confessions of Protestant churches, synods, assemblies, etc., from the confession of Augsburg down to that of the synod of Cambridge (1648), and of Seybrook still later, and including the English confession of the thirty-nine articles, and asserts that the doctrine of the future punishment of infants "has never been avowed in a Calvinistic confession of faith, or implied in any thing taught in one, from the reformation to this day."

But he admits that the "mode of stating the doctrines of original sin, adopted by the reformers," had been such as to give some seeming countenance to the charge that Calvinists believed in the doctrine of infant damnation; but he calls attention to the fact that these modes of stating the doctrine of original sin "have been exchanged in New England, for many years, for views and language which utterly preclude even the appearance * * * of ground for such an inference." He adds, "The mode of stating and explaining the doctrine of original sin, and other kindred doctrines, which I have adopted, and which some affect to consider as new, * * * is a mode of explaining and vindicating the doctrines of the reformation, which was adopted in New England more than seventy years ago. Some of the most approved writers on this subject are Hopkins, the younger Edwards, West, Smalley, Spring, Strong, Dwight; and, in England, Andrew Fuller, one of the greatest and best of men." He concludes by the assertion that "the charge so long circulated against Calvinists, that they believe in the damnation of infants, is utterly false; and knowing it to be so, I publicly deny it. * * * The Calvinists of New

England and of the United States do not hold that infants are damned."

"From Luther to Calvin there was progress; from Geneva to New England there was more." 1 Bancroft's Hist. U. S. 464. Belknap says, "In the doctrinal points of religion, they (the puritans) were of the same mind with their brethren of the church of England, as expressed in their articles." But their peculiar system of polity, the Congregational system of church government, was the result of the studies of the renowned John Robinson, who was the pastor of the puritans in Holland, "who seems to have had more of the genuine spirit of the reformation and of freedom from bigotry than any others in his day. His farewell charge to those of his flock, who were embarking in Holland for America, deserves to be held in perpetual remembrance." He then gives the substance of this farewell charge, in which Robinson adverted to the advance in truth which had been made by Luther, and the still greater advance made by Calvin, and lamented the disposition in their followers to stop with their favorite teachers, and go no further in search of truth than they went, and adds, "For though they (Luther and Calvin) were burning and shining lights in their times, yet they penetrated not into the whole council of God; but, were they now living, would be as willing to embrace farther light as that which they at first received. I beseech you to remember it as an article of your church covenant, *that you be ready to receive whatever truth shall be made known to you from the written word of God.* Remember that, and every other article in your sacred covenant. But I must herewith exhort you to take heed what you receive as truth. Examine, consider, and compare it with other scriptures of truth before you receive it; for it is not possible the Christian world should come so lately out of such thick anti-Christian darkness, and that the perfection of knowledge should break forth at once." Belknap's Hist. N. H. 38, 39.

The reformation has in fact gone far beyond Luther and Calvin, as the articles of faith, and more particularly the doctrinal preaching of the Lutheran and Calvinistic churches of the present day, will show. But, while they have changed and modified the old formulas of doctrine and introduced new ones, they still uniformly adhere to the doctrine of John Robinson, that all religious truth is to be made known and received from the written word of God." That is the source of all religious light and truth. If new develop-

ments of truth are to be looked for, they are to be expected to be made known from that source alone. By this standard all new truth is to be tried ; it is to be examined, considered, and compared with other scriptures of truth, and must be proved to be founded upon, and emanate from, *the written word of God*, before it is received. Upon this point all denominations of Christians, now termed evangelical, are agreed. This in fact was the doctrine of the reformation, the great doctrine which was the foundation and chief corner-stone of the reformation, that the Bible alone was, and was to be, the only source of all true religious light, and of all revealed religious truth ; and that every doctrine in theology, as well as every course of life, is to be tried by this test and judged by this standard ; in fact, Lutherism and Calvinism are only excellent so far as they embody the real teachings and doctrines of the Bible.

That was the faith of the puritans ; that is generally the faith of their descendants. A few only have apostatized, and believe with Mr. Abbott and some of his associates and followers, in a religion "that acknowledges no leader, is loyal to no master, imitates no exemplar, looks to no redeemer, needs no savior, knows no Christ."

A decree may be entered, in substance, that the prayer of the bill be granted with costs ; that said York, Folsom, and Horsch, wardens of said First Unitarian Society of Christians in Dover, and all other wardens of said society, be strictly enjoined and forbidden to hire, employ, allow, suffer, or permit, said Francis E. Abbott, or any other person, to preach and inculcate in the meeting-house of said society, doctrines subversive of the fundamental principles of Christianity, as generally received and holden by the denomination of Christians known as Unitarians ; or to employ, suffer or permit to preach in said meeting-house, said Abbott, or any other person who rejects and teaches a rejection of Christianity and its fundamental doctrines, or who preaches and inculcates a disbelief in the doctrines of the Lordship and Messiahship of Jesus Christ, as taught by him in the New Testament Scriptures, or a disbelief in Jesus Christ as the great head of the church, or of his divine mission and authority as a religious teacher, as thus taught by himself, or who preaches or inculcates a denial of the doctrine that the Scriptures or the Old and New Testaments contain a divine revelation, given by inspiration of God, and containing a sufficient and perfect rule of faith and practice ; and that said Abbott and

Eastman v. Clark.

his associates and fellow-disbelievers in Christianity be strictly enjoined and forbidden to occupy said meeting-house of said society, for the purpose of preaching or inculcating said disbeliefs, denials and doctrines, hereinbefore prohibited to be taught therein, and any and all other doctrine or doctrines subversive of the fundamental principles of Christianity, as generally received and holden by the denomination of Christians known as Unitarians.

PERLEY, C. J., and BELLOWS and NESMITH, JJ., concurred in the general conclusions and result of the foregoing opinion.

DOE, J., delivered a dissenting opinion occupying nearly one hundred and fifty pages of the original report.

EASTMAN V. CLARK.

(33 N. H. 376.)

Partnership — test of — sharing profits.

Participation in profits is not a decisive test of partnership, but such participation is competent evidence to show the relation of principal and agent between the persons taking the profits and those carrying on the business.

The question of liability of one sharing profits is a question of agency, whether he stands in the relation of principal to the one who contracted the obligation.

In assumpsit against three, one only defended, and the question tried was whether he was a partner of the others. The jury was instructed to find that he was so if he did business with them under an agreement either to share the profits or the gross receipts. *Held*, that the instruction was wrong.

ASSUMPSIT by Eastman against Curtis Clark, Damon Clark and Nicholas Stillings to recover moneys due for corn sold by plaintiff to defendants in 1864. The first two defendants were defaulted and Stillings pleaded the general issue.

At the trial the evidence showed that in 1864 defendants ran a line of stages between the White Mountain Notch and the town of Jackson; that, by an agreement between them, the two Clarks furnished a coach and two six-horse teams, etc., for the use of the line and Stillings a like amount of stock.

Eastman v. Clark.

The plaintiff's evidence tended to show that the teams were to be supported at the joint expense of all the defendants, and that the profits of the entire business were divided, one-half to the Clarks and the other half to Stillings. On the other hand, the defendants' evidence tended to prove that each party was to maintain and support his stock at his own expense, and that it was so maintained, and that the gross receipts were to be divided between the parties, one-half to the Clarks and one-half to Stillings, and that they were so divided.

The court instructed the jury that the defendants would be partners as to third persons whether by agreement the gross receipts or the profits were divided, and would be jointly liable for supplies furnished for the business, unless the plaintiff had notice that there was to be no such joint liability. To these instructions the defendants duly excepted. The jury returned a verdict for the plaintiff, but found specifically that the profits were not divided, but that the gross receipts were divided.

Some time after the jury had retired, they sent to the presiding justice this question: "If the jury find that the Clarks and Stillings divide the gross receipts, does that bind them jointly to the third party?" to which this answer was made in writing, with directions to return it into court with the other papers: "If the jury find that the Clarks and Stillings ran the staging together upon the agreement to divide the gross receipts between them, they are liable for supplies furnished for that business." The defendants' counsel except to these instructions, because of omitting the qualification that the defendants would be liable jointly unless the plaintiff had notice that there was to be no such joint liability; which qualification had been before distinctly given. If there is error in omitting this qualification, the verdict is to be set aside, but no judgment entered for Stillings, unless error is found in the instructions as to gross receipts.

C. W. & E. D. Rand and Farr & Son, for plaintiff.

H. Bingham and Jackson, for Stillings.

JEREMIAH SMITH, J. This is an action of contract. To charge the defendant Stillings in this form of action, it is necessary to show, either an actual contract entered into by him, or such cir-

cumstances that the law will, by a fiction adopted for the sake of the remedy, imply a contract "directly against the actual fact."

Upon the findings of the jury, it is clear that there was no actual contract on the part of Stillings to pay for the corn; there was no engagement to that effect signified, either by the words or by the conduct of Stillings. A "contract in fact" can be proved in only three ways. It must appear that the contract was made by Stillings in person, or that it was made by his duly authorized agent, or that he is estopped to deny the agency of the person making the contract. None of these facts exists here. It is not pretended that Stillings made the contract in person. The Clarks, who did make it, were not Stillings' agents to purchase corn, but were bound, as between Stillings and themselves, to purchase solely on their own credit. Nor is Stillings estopped to deny that they were his agents. It does not appear that he ever held them out, or knowingly permitted them to hold themselves out, as his agents. If Stillings and the Clarks had held themselves out to the plaintiff as partners, and the plaintiff had not known the real terms of their agreement, Stillings would undoubtedly be estopped to deny, as against the plaintiff, that the Clarks had authority to bind him to the same extent that one partner is usually authorized to bind another. But nothing of the kind appears here; and it is clear, upon the findings of the jury, that Stillings is not chargeable as a contractor in fact.

This conclusion, however, is not necessarily decisive of the present case. If the forms of common-law action were "adapted to the truth of the case," a defendant could not be held liable in an action of contract except upon proof of an actual contract, "either express or tacit." But, by a fiction adopted for the sake of the remedy, the law, in some instances, allows an action of contract to be maintained to enforce a legal obligation or duty which the defendant has never in fact promised to perform. The law, in such cases, "implies a promise," though such implication may be "directly against the actual fact," and even against the party's strongest protestations." See Metc. on Cont. 5-10, 163, 164; *Scova v. True*, Merrimack, June term, 1873. It becomes necessary, therefore, to consider whether justice requires that Stillings, contrary to his actual contract and intention, should be compelled to pay the debts contracted by the Clarks in running their stage. An agreement to share gross returns might be of such a nature as

to afford cogent, if not conclusive, evidence *per se* of an intent to defraud creditors. The present, however, is not such a case. It is to be noticed in the outset, that no fraud in fact is imputed to Stillings. There is nothing to show that the plaintiff put his claim on that ground at the trial. For aught that appears, the arrangement was made *bona fide*, and there certainly was a valuable consideration. The obvious purpose was to prevent the ruinous consequences of competition. The results do not appear; but it is by no means improbable that the share received by each party was larger than it would have been if competition had been engendered by the absence of such an agreement. And if either party lost by the agreement, it does not appear that Stillings was not the loser and the Clarks the gainers. The case, then, presents an agreement, made in good faith and for a valuable consideration, which need not necessarily have operated to the prejudice of the creditors of the Clarks, and is not shown to have actually prejudiced them. Yet it is contended that the making and carrying out of this agreement is sufficient cause for holding Stillings liable, "to his last shilling," to pay the debts contracted by the Clarks, notwithstanding the agreement expressly provides to the contrary. This claim is attempted to be supported on the ground that Stillings, by taking a part of the gross receipts of the Clarks, has taken part of the fund upon which the creditors of the Clarks relied for their payment. It may well be questioned whether there is any foundation for this reasoning, until it is shown that the gross amount of the fares received by the Clarks on their stage exceeded the amount received by Stillings on his stage. If Stillings took two thousand dollars for fares, and the Clarks only fifteen hundred dollars, it is obvious that Stillings, instead of taking from the "fund" of the Clarks, would add two hundred and fifty dollars to it. So, if the fares received by each were equal, Stillings took nothing from the "fund." But, assume that the fares received by the Clarks exceeded by one hundred dollars the fares received by Stillings, and that the Clarks consequently paid Stillings fifty dollars: it may be that Stillings is liable to refund that sum, to be applied in payment of the debts contracted by the Clarks in running their stage. An hostler, who openly labored for the Clarks in taking care of their stage horses, would not be compelled to refund his wages merely because they were paid out of gross returns. All the other creditors of the Clarks know, or ought to know, that the

Eastman v. Clark.

hostler is to be paid out of the fares. It is no surprise to them to find the gross receipts diminished in this way. But those creditors cannot be supposed, in the absence of evidence, to know that an apparently rival line is to receive part of the gross receipts of the Clark stage. Although the engagement with Stillings was in aid of the business of the Clarks, still the existence of such a contract could not ordinarily have been contemplated by third persons giving credit to the Clarks. In the absence of notice of the bargain with Stillings, persons selling grain to the Clarks had a right to suppose that the entire gross receipts to be derived from the Clark stage would belong to the Clarks, and would be primarily liable to discharge debts contracted in aid of the business. Stillings, not having undeceived them by publishing the agreement, may be estopped as against them to deny that the entire gross receipts of the Clarks are primarily chargeable with the payment of these debts. He may be compellable, by appropriate proceedings in equity, to refund the fifty dollars if needed to pay debts of this class, as a legatee may be compelled to refund for the benefit of a creditor of the testator. See 1 Story's Eq. Jur., § 92. But why should he also be held liable to pay all the debts contracted by the Clarks in this business, which may exceed by a hundred fold the amount received by him and afterward refunded? Why should the receipt of fifty dollars, which he is compellable to pay back, make Stillings liable for five thousand dollars to the creditors of the Clarks, who did not in fact rely upon him when they gave credit to the Clarks? By the restoration of the fifty dollars, he completely repairs all the injury done by him to the creditors. Why, then, should this extraordinarily severe penalty be visited upon the making of a *bona fide* agreement, after and in addition to full satisfaction of all the actual damage? Why punish an honest mistake by compelling amends for mischief never done? Such a result seems an unwarrantable extension of the much questioned doctrine of exemplary or vindictive damages. The mere making of this agreement prejudiced no one, and does not prove an intent to defraud. It is only by the carrying out of this agreement that the creditors of the Clarks are damnified; and the only possible damage to them is the diminishing of the "fund." If that fund is restored whole as at first, what more can they ask? If a thief had stolen fifty dollars from the receipts of the Clarks, he certainly would have taken from the fund on which their creditors

relied for payment; but would anybody claim that he was therefore liable to pay all the debts of the Clarks? And, if not, why should this liability be imposed upon Stillings?

If it be argued that it is against the policy of the law to allow a man a chance to share in the receipts of a business without also sharing all its liabilities, the answer is, that the law permits such agreements as the present to have full force and effect when the stipulations are known to those dealing with the parties; see 2 Am. Law Review, 7, 8, 202; and the intrinsic justice of this legal principle seems to be recognized by the legislative enactments relating to limited partnerships, "which provide for the public record of the partnership limitations as a method of making them known to third persons;" see, also, as to statutes, KELLY, C. B., in *Holme v. Hammond*, L. R., 7 Exch. 218, p. 227. It is only to secret agreements of this nature that objection is made; see BELL, J., in *Bromley v. Elliot*, 38 N. H. 287, 303. So far as the creditors have been misled by the secrecy, it is proper that they should be allowed to insist on the rights which they were led to suppose they should have. They may well claim that, so far as they are concerned, the apparent position of the business and the property must be conclusively regarded as the real position. But, after they have been given every right which they had reason to believe they should have, why should they also be given a further right which they never expected, or had reason to expect, and which frustrates the real intention of all parties?

Perhaps it may be objected that it will often be difficult to determine how much the secret sharer has received out of the gross receipts; but the difficulty can be no greater, and would often be less, than that ordinarily incurred in the winding up of a partnership, a matter of common equity jurisdiction, where it is necessary to take an account and decree a division of the surplus. Moreover, it cannot be for the interest of the secret sharer to withhold information as to the amount of his receipts, for all doubts on that point would be construed against him.

Stillings, by taking a share of the gross receipts, has hardly placed himself in the position of a devisee who takes a devise charged by the will with the payment of a certain sum. The charge in the latter case is absolute, irrespective of the value of the devise. Only one inference is deducible from the acceptance of the devisee. He is held liable to bear the entire burden,

on the ground that a tacit promise to that effect is fairly to be inferred from his conduct. Here, the charge on the share of the receipts is merely to apply that money to pay the debts of the Clarks, so far as it will go. There seems no foundation for inferring a promise on the part of Stillings to pay all the debts.

"It is, we think, too firmly established to be now questioned, that where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though, in fact, he was not. It has often been doubted whether it was originally right so to hold; but, doubts of this kind come now too late; for we think that it is established law that, if, on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him with whom he believed himself to be contracting, and to whom alone he gave credit, and to leave the trustees of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price himself direct from the principal, subject to an exception which is not so well established as the rule, and is not very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor." BLACKBURN, J., in *Armstrong v. Stokes*, L. R., 7 Q. B. 598, 603, 604. But this doctrine, relative to charging originally undisclosed principals, does not establish the liability of Stillings in this case. To lay a foundation for the application of the doctrine, it must first be made to appear that Stillings was a principal in the business of the Clarks. This is precisely where the plaintiff's case labors throughout. If, indeed, all that appeared as to the mutual relations was the fact that Stillings was to share in the gross receipts of the Clarks, that fact, standing alone and unexplained, might justify a jury in finding that Stillings was a principal in their business. But when all the other facts, relative to the agreements and mode of conducting the business, appear, and are viewed, as they must be, in the light of the special findings of the jury, it seems quite apparent that Stillings was not a principal in the business of the Clarks, nor the Clarks principals

in the business of Stillings. On the contrary, the two parties respectively continued to carry on their business on their own behalf alone, although they had bound themselves to pay over a part of what they received. See 3 Kent's Com., 12th ed., 25, note 1, citing cases of "arrangements for pooling profits." Various questions may, in other cases, arise as to the practical operation of the rules of law relative to the liability of originally undisclosed principals. Suppose A employs B to make a purchase in B's name for him (A), upon a secret agreement between A and B that A is not to be responsible to the seller for the price, can the seller, upon subsequently discovering that A employed B to make the purchase, sue A for the price? Can the limitation, that A was not to be responsible, be held nugatory, as being inconsistent with A's direction to B to effect the purchase? Or, can the limitation be regarded as presumptively fraudulent, and hence invalid on that ground? See the remarks of BRAMWELL, Baron, in *Bullen v. Sharp*, L. R., 1 C. P. 86, pp. 126, 127, quoted in a subsequent part of the present opinion. In some cases A might, perhaps, be held liable on the ground of estoppel — as where B is a London Broker, and the purchase which A employs him to make is in the ordinary course of brokerage business. "A broker always professes to make a contract between two principals. * * * In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal, between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal." BLACKBURN, J., in *Armstrong v. Stokes*, L. R., 7 Q. B. 598, p. 607. In such a case, A may be regarded as allowing B to hold himself out as authorized to bind the unnamed principal by the contract of purchase. None of these questions, however, arise in the view that I am disposed to take of the present case: for I do not regard Stillings as a principal in the business of the Clarks, or as having authorized or employed the Clarks to make the purchase of the plaintiff.

Different opinions have been expressed on the question whether the sharer of gross returns is, by operation of law, liable to third persons as a partner, in spite of an undisclosed agreement negativ-

ing such liability. 2 Am. Law Review, 9, 10, 198; Para. on Partnership, 88, note *q.*; Story on Partnership, 6th ed., § 34, n. 1; CROMPTON, J., in *Lyon v. Knowles*, 3 Best & Smith, 556, p. 564; MARTIN, B., in *Hickman v. Cox*, 3 C. B. (N. S.) 523, p. 562; instructions to jury by PARKE, B., in *Heyhoe v. Burge*, 9 C. B. 431, p. 440. (Several of the cases sometimes cited on this point were really decided on other grounds; some of them on the ground that the "sharing" was merely a mode of compensating for services openly rendered.) The question has not often been fully considered on general principles. In some instances, the point most discussed is, whether the case of the sharer of gross returns comes within the letter or the reason of a rule of law which has sometimes been supposed to exist in relation to the liability of the sharer of net profits. It has sometimes been supposed to be the rule of the common law, that one who makes a secret agreement with the ostensible manager of a concern that he shall share in the net profits but shall not be answerable for losses is, nevertheless, by operation of law, liable as a partner to third persons for all the debts of the concern, although he was never held out as a partner, or relied on as such by those dealing with the concern, and although he has never in fact received any profits. One reason given for the supposed doctrine is that, if any one takes part of the profits, he takes part of the fund on which the creditor of the trader relies for his payment; or, in other words, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.

The question has been raised, whether consistency to the supposed "net-profit rule" requires that a sharer of gross returns should be held to a similar liability.

On the one hand, the letter of "the net-profit rule" has been looked at without regard to its reason. It is said, in substance, that gross returns, though they include net profits, are not literally the same thing; that a participant in gross returns does not participate in profits *as* profits; and that a division of gross returns is only incidentally a division of profits, not a division of profits *as* such. This reasoning is extremely unsatisfactory.

On the other hand, it is said that the reason of "the net-profit rule" applies with much greater force to the sharer of gross returns. Gross returns necessarily include net profits. If the

Eastman v. Clark.

sharer in net profits takes from the creditors the fund upon which they rely for payment, much more does the sharer in gross returns. And, if taking from the fund is sufficient reason for holding the former liable, *a fortiori*, it is a reason for holding the latter. Net profits "are only to be ascertained after deducting and providing for all liabilities; but the amount of a share in the gross proceeds would be ascertained, and might be taken away as soon as they were received, without providing for the liabilities." See O'BRIEN, J., in *Shaw v. Galt*, 16 Irish Com. Law, 357, 373.

This train of reasoning appears to be unanswerable.

If, then, the supposed "net-profit rule" is founded in reason and is to be upheld, consistency requires that the defendant Stilings should be held liable. It seems, therefore, hardly possible to avoid meeting, in this case, the question whether the supposed net-profit test, "in its literal and unqualified form," is a sound rule of law, founded in reason. (It is not proposed, in this opinion, to enter upon the inquiry how far the supposed test has ever been actually adopted as the basis of judicial decision.) The intrinsic correctness of the supposed test has been so often and so successfully disputed, that the views now about to be presented are little more than a mere compilation.

One of the principal reasons urged in favor of the supposed doctrine is that already adverted to, viz.: that the man who takes part of the net profits, takes part of that fund on which the creditor of the trader relies for his payment. The short answer to this reason is, that it is founded on a false assumption. Creditors neither can, nor do, rely on net profits for payment. Net profits "do not exist until creditors are paid." *Testimony of Commissioner Fane*, quoted in Story on Part., 6th ed., § 36, note 3. The very fact that net profits are realized "presupposes that the creditors of the firm are satisfied, or that the partnership assets are sufficient to satisfy their claims." 2 Am. Law Review, 195. And if it were possible in the nature of things for creditors to rely on the net profits as a fund for the payment of their claims, it is not probable that they would do so; for they must know that the amount of the net profits would generally be insufficient for that purpose.

Another reason given for this rule is, that if one stipulates for an interest in the profits of a business which would entitle him to an account, and give him a specific lien or a preference in payment over other creditors, giving him the full benefit of the increased

profits without any corresponding risk in case of loss, it would operate unjustly as to other creditors. This reasoning is effectually disposed of by Mr. Gray, in his notes to the 6th edition of Story on Part., § 49, note 2, as follows: "The creditors to whom he is preferred are only the separate creditors of the actual partners; he has no preference over the partnership creditors, for there are no profits till they are paid, and it is only out of the profits that his remuneration is to come. Why should the fact that he has a priority over one set of creditors make him liable 'to his last shilling' to another set of creditors? A second mortgagee has a priority over the mortgagor's general creditors; but has it ever been argued that *therefore* his whole property, of every kind, should be liable for the first mortgage debt? Yet the cases would seem very analogous. And though a partner is entitled to an account, yet a person may well be entitled to an account and yet not be a partner. If he is to receive a sum equal to a share of the profits, he is, by the great weight of authority, clearly no partner; yet how can he secure the payment of the compensation agreed upon unless he has an account? See, also, 2 Am. Law Review, 199.

The argument, that the sharer of the net profits will otherwise receive usurious interest without risk, does not seem very forcible. Usury is punished by the refusal of the law to enforce usurious contracts, or by the imposition of penalties; but it is not customary to punish usury by compelling parties to perform contracts which they never made.

The only other alleged reason deserving special consideration at this time is, that the net-profit rule is necessary to "protect third persons against the frauds which might be practiced, if *secret* agreements were allowed to be binding on third persons." See BELL, J., in *Bromley v. Elliot*, 38 N. H. 287, 303. It is conceded on all hands that, so far as the agreement is known, it must be binding on all who have knowledge of it — *id.*, and see 2 Am. Law Review, 7, 8, 202; but it is urged that to allow force and validity to a secret agreement would often work a fraud on third persons. In this view, the liability of the sharer of net profits depends solely upon the secrecy of the agreement.

What are the probable frauds which cannot be remedied save by holding the secret stipulator for a share of the net profits liable to pay the entire debts of the concern, in direct contravention of an agreement that he shall not be so liable? If his failure to disclose

Eastman v. Clark.

the agreement has caused persons dealing with the firm to entertain a reasonable belief in the existence of a certain state of facts, and to act on that belief, he cannot now be permitted to controvert, to the prejudice of such persons, the existence of such facts. If, for instance, A allows B to hold himself out as the sole owner of a stock in trade, and to gain credit thereby, an attachment of that stock in trade by a creditor of B will not be defeated by proof that the stock was furnished by A, under a secret agreement between A and B that it should remain A's property. Having knowingly allowed B to gain credit on the faith of his ownership of the stock, A cannot now, as against those who have given B credit, deny that B is the owner. See *Elliot v. Stevens*, 38 N. H. 311; *Kelly v. Scott*, 49 N. Y. 595. The receipt of *net* profits, while any debts of the concern remain unpaid, seems almost or quite an impossibility; but if a person, entitled only to share in net profits, gets hold, by accident or design, of part of the gross returns, he must of course refund them if needed to pay debts; for his own agreement does not authorize him to receive any dividend until all the debts are paid. A secret stipulator for a share of the gross returns would not be thus cut off by his own agreement from retaining such funds; but, as already intimated, he would be quite as effectually barred by the application of the principles of estoppel. If A allows B to hold himself out to the world as the sole owner of the gross returns of a business, A cannot withhold a portion of those gross returns from the creditors who were thus led to trust B. He is estopped from showing a different state of facts from that which his silence induced the creditors to believe in. But the doctrine of equitable estoppel is remedial, not vindictive. The estoppel will not be carried further in any case than is necessary to prevent one party from being injured by his reliance upon the conduct of the other. 2 Smith's Lead. Cases, 5th Am. ed., p. 644. It is enough to put the party misled in the position he would have been in if the representations actively or passively made by the other party had been true in fact. If B has never allowed himself to be held out as personally liable for debts contracted by A, and the creditors of A have had no reason to rely and have not relied on B's security, why should B be estopped from showing that he is not liable? "A is not the agent of B; B has never held him out as such; yet C is entitled, as between himself and B, to say that A is the agent of B! Why is he so entitled, if the fact is not so, and B

has not so represented?" If C, knowing of an agreement between A and B that B shall not be liable for debts contracted by A, deals with A, he has no claim on B. "Why should he, if he does not know of it? Why, upon finding out something between A and B which has in no way affected or influenced him, should he who has dealt with A have a claim on B," contrary to the intention of both A and B? See BRAMWELL, B., in *Bullen v. Sharp*, L. R., 1 C. P. 86, pp. 125, 126. If the only objection to these agreements is the secrecy, is it not enough to compel the reparation of all damage caused by the secrecy? Because B has caused C to believe in the existence of a certain fact, shall B therefore be estopped to deny the existence of an entirely distinct fact, in the existence of which C never believed? Why should the law impose upon B the performance of a duty which he never undertook, and which C never supposed he had undertaken? A strong argument against the supposed "net-profit rule" is afforded by the claim to which it legitimately gave rise in *Kilshaw v. Jukes*, 3 Best & Smith, 847. Kilshaw supplied timber to Till & Wynn for houses which they were building. Till & Wynn offered Jukes as a guarantor for the price of the timber, but his security was rejected by Kilshaw. Kilshaw subsequently, having, as he thought, discovered that Jukes was a participator in the net profits of the house-building, sued him as a copartner, thus, in effect, attempting to enforce payment from a man on whom he never relied, and whose guaranty he had expressly refused! Yet, if Jukes had in fact participated in the net profits under an agreement that he should not be liable for debts, we think Kilshaw's claim might well have been supported under the supposed "net-profit rule."

The maxim, "*qui sentit commodum sentire debet et onus*," is not decisive in favor of the supposed rule. It must be presumed that the secret stipulator for a share of the net profits gives something for the right. (If he does not, there is no consideration, and hence no valid agreement.) If he does pay anything to the ostensible manager, or puts any capital into the concern, he does "bear a burden;" he runs the risk of losing what he thus pays or puts in. His claim is not enforceable until after all the creditors of the concern are satisfied. Furthermore, notwithstanding this maxim, an agreement to share profits without being liable for debts is not in its nature against the policy of the law. This, as has already been said, is evident from the fact that such agreements, so far as they

Eastman v. Clark.

are known to persons dealing with the concern, are allowed full scope and effect. See 2 Am. Law Review, 7, 8, 202; *Bailey v. Clark*, 6 Pick. 372; BELL, J., in *Bromley v. Elliot*, 38 N. H. 287, p. 303.

"It may be said that if this reasoning is right, a man might bargain to receive all the profits of a business and not be liable. The answer is, the thing is impossible. There never was and never will be a *bona fide* agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colorable." BRAMWELL, B., in *Bullen v. Sharp*, L. R., 1 C. P. 86, pp. 126, 127. In other words, it would be almost impossible to satisfy a jury that even the form of such an agreement was ever entered into; and, if that fact should be established, the mere making of such an agreement would, under ordinary circumstances, afford cogent evidence of an actual intent to defraud creditors. And participators in that intent would in some form of action (whether in contract or tort is not now material) be held answerable to make good the loss of all who suffered by the conspiracy. We are dealing here only with *bona fide* agreements. Colorable arrangements will be attempted under any rule or test.

The supposed "net-profit rule" is not needed to reach the case of an ostensible partner. He is liable on the elementary principles of the law of estoppel, because he held himself out as a partner. Nor is it needed to reach the case of a dormant partner who was to participate in the profits and the losses. He is liable just as any other undisclosed principal is, under the ordinary doctrines of the law of agency. In such a case "the dormant partner knows he is liable, and means to be." BRAMWELL, B., in L. R., 1 C. P. 126.

Nor does the repudiation of the supposed rule annihilate the ordinary presumptions of fact. If it appears that B stipulated for a share in the profits of a concern, a jury fairly may, and always will, presume, in the absence of any evidence to the contrary, that he also agreed to be liable for the losses. That is the *prima facie* inference, justified by common experience. But the supposed "net-profit rule" goes further, and conclusively presumes that he contracted to pay the debts, in the face of satisfactory evidence that it was expressly stipulated to the contrary. It does not allow him to rebut the presumption. In every case where there is an agreement to participate in the net profits, there is incidentally and

Eastman v. Clark.

to a limited extent a participation in the losses as well as in the profits; for, before it can be ascertained that there are any profits, the losses must first be deducted, and the residue only shared as profits. See Story on Part., § 60. But, because a man has subjected himself to this incidental sharing of the losses, why should the law conclusively presume him personally liable to respond for all losses out of his general property?

It is not the least of the objections to the supposed rule, that the hardship of its application to individual cases will lead to the introduction of subtle exceptions to the rule, exceptions "which aggravate the bulk of the *Corpus Juris*, and (what is an evil of still greater magnitude) which reduce the body of the law to a chaos of incoherent details." See 1 Austin on Jurisprudence, 3d ed., 483.

In truth, "the law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view." Lord WENSLEYDALE, in *Cox v. Hickman*, 8 House of Lords Cases, 268; S. C., 99 Eng. Com. Law, 47, pp. 98. 99. The same great judge said, nearly twenty years earlier: "All questions between partners are no more than illustrations of the same questions as between principal and agent." PARKE, B., in *Beckham v. Drake*, 9 M. & W. 89, p. 98. See *Cox v. Hickman*, 8 House of Lords Cases, 268; S. C., 99 Eng. Com. Law, 47; *Bullen v. Sharp*, L. R., 1 C. P. 86; *Re English & Irish Church & University Assurance Society*, 1 Hemming & Miller, 85; *Shaw v. Galt*, 16 Irish Com. Law, 357, p. 375. *Holme v. Hammond*, L. R., 7 Exch. 218; *Kilshaw v. Jukes*, 3 Best & Smith, 847; Story on Part., 6th ed., § 49, note 2; cases of "arrangements for pooling profits," cited in 3 Kent's Com., 12th ed., p. 25, note 1.

The real and ultimate question in all cases like the present is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, "except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business." Whether such relation existed is a question of fact. Upon the trial of that question, proof of a right to participate in the profits would be a cogent, and often practically conclusive, piece of

evidence to establish the existence of that relation ; but there is no sound foundation for an arbitrary rule of law requiring courts or juries to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts.

Undoubtedly, in a great majority of cases, persons who would be held liable under the supposed "net-profit test," will also be found liable under what I view as the true test. But the present case affords evidence that the difference between the two tests is substantial, and not merely verbal. It is to be borne in mind that, in what has here been said as to the supposed "net-profit test," reference is made solely to that test in the "literal and unqualified form" in which it is stated in a previous part of this opinion. Whether the test, in that form, has ever been adopted as the basis of judicial action, it is not my present purpose to inquire. The intrinsic correctness of the supposed test is the only point intended to be here discussed.

Upon the foregoing views, the literal terms of the reserved case would justify the court, not only in setting aside the verdict for the plaintiff, but also in rendering judgment for the defendant Stillings. But I am inclined to give the plaintiff another opportunity to try the case upon the facts, in the light of the opinion now expressed as to the law. There is some reason to believe that, at the late trial, the plaintiff's counsel and the presiding judge both assumed the "net-profit test" to be unquestionable law, and that this position was not seriously controverted by the defendants' counsel. If the "net-profit test" were law, logical consistency would, as has already been said, require that Stillings should be held liable here upon the admitted facts of the case. Under the misconception as to the law, which seems to have been tacitly adopted by all parties at the trial, the plaintiff's counsel might have supposed themselves sure of success on the admitted facts, and thus have failed to present their case fully on the controverted facts. It is conceivable that the plaintiff's counsel might have made a stronger case as to the authority in fact given by Stillings to the Clarks, or that they might have introduced evidence on the question of estoppel, if they had understood how essential it was to succeed on one or the other of these issues of fact. Under all the circumstances, I am disposed to give the plaintiff another opportunity to try the questions of fact—although, if the findings at the new trial are like

those at the former trial, the defendant Stillings will, in my opinion, be entitled to judgment. The verdict should be set aside.

DOX, J. When Judge STORY had written his treatise on agency, he began his commentaries on the law of partnership thus: "Having completed our review of the law of agency, we are naturally conducted, in the next place, to the consideration of the law of partnership; for every partner is an agent of the partnership, and his rights, powers, duties and obligations are, in many respects, governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and, so far as he acts for his partners, he may as properly be deemed an agent." STORY on Part., § 1.

"The authorities are uniform in maintaining the doctrine that where the principal is unknown to the vendor at the time of the sale, he may, upon discovering the principal, resort to him for payment, although, in the absence of such knowledge, the credit may have been given to the agent alone, and his individual note alone have been taken for the debt. STORY on Agency, 291; *Paterson v. Gandasequi*, 15 East, 62; *Raymond v. Crown & Eagle Mills*, 2 Metc. 324; *Thomson v. Davenport*, 9 B. & C. 78. The same principle which seems to have been uniformly applied to the case of principal and agent is equally applicable to that of an individual partner and his firm. Each partner is an authorized agent for the firm; and if the individual partner obtain money or goods on his own credit for the use of the firm, without disclosing the interest of the partnership in the transaction, the debt contracted is the debt of the firm, notwithstanding the note of the individual partner alone may have been given and taken therefor." *Tucker v. Peaslee*, 36 N. H. 167, 176; *Farr v. Wheeler*, 20 id. 569, 575. "As the defendants were partners, they were both liable to the plaintiffs, notwithstanding at the time of the sale the plaintiffs supposed that they were giving credit to Smith only. In purchasing the goods; he was the authorized agent of the copartnership * * * and the plaintiffs * * * may well sustain an action against those who were in truth the purchasers." *Smith v. Smith*, 27 N. H. 244, 253.

When A authorizes B to make a contract in his behalf, the contract is, in a certain sense and for some purposes, the contract of A. In contemplation of law he makes it. Whether he makes it personally by the exercise of his own mind, hand or voice, or instrumentally by the mind, hand or voice of his agent B, is immaterial so far as his own liability is concerned. He is as much the principal in one case as in the other. So he is equally a principal whether he is sole principal and B his agent, or whether B is a joint principal with him as well as his agent. If they are partners, B makes the contract as a principal, and also as agent of A. If we say he makes it as an agent of the firm, we mean that he makes it as agent of A, and also as agent of himself. And as the contract is equally A's contract, whether B is merely his agent, or his agent and also a joint principal with him, so in each case A is equally bound, whether he is or is not known to the other contracting party to be a principal. The cases in which A is not liable because the other contracting party, knowing him to be a principal, elects not to contract with him, stand upon the ground of the election thus made by the other party. Without reference to that exceptional class of cases, and with sole reference to the general question raised in this case, if B is agent, A is liable because he is the principal: if B is a joint principal as well as agent, A is liable because he is a principal: if A is known to the other contracting party to be a principal, he is liable because he is a principal: if he is not thus known, he is liable because he is a principal.

In the case supposed by brother Smith (*ante*, page 199), where A employs B to make a purchase in B's name for him (A), upon a secret agreement between A and B that A is not responsible to the seller for the price, a difficulty arises from an ambiguity in the terms, "A employs B to make a purchase in B's name for him (A)." If this means that A is the principal and B his agent, A is liable because he is the principal. *Edmunds v. Bushell*, L. R., 1 Q. B. 97. If it means that B, as principal, is to buy the property of C, and then sell it to A, A is not liable to C, because he is not the principal. The question of A's liability is the question whether, in the contract of purchase from C, A is in fact the principal and B his agent, or whether B is the principal, who, after he has bought the property of C, is to sell it to A; whether the title passes directly from C to A, or from C to B and from B to A; whether there are to be two successive purchases of the same property, or

only one; whether (in the contract of purchase from O) A or B is the purchaser. This depends (so far as A's liability is concerned, and aside from fraud and estoppel) upon the understanding between A and B. If they understand the title passes directly from O to A, and not through B as an intermediate purchaser, A is the principal, B is his agent, and A, as the purchaser, is bound to pay C for the property which he buys of C. A's denial of the fact that he is the purchaser has no more effect than his denial of any other fact; an agreement between him and B to deny the fact does not alter the fact; A, being the purchaser, is responsible as the purchaser for the price; he is liable upon the fact, and is not discharged from his liability by an understanding between him and his agent that the fact should not be disclosed or should be denied. A purchase of goods is a sale; and a sale is something more than the vendor's parting with his property. It includes payment made, promised, or in some way provided for by the other party to the contract. The buyer, i. e., the principal who buys, is necessarily a payer, unless the vendor agrees he shall not be. If the agreement between A and B is made known to C during the negotiation, and he expressly or impliedly agrees not to look to A for payment, he is bound by his agreement; but he is not bound by a secret agreement between A, the purchaser, and B, the purchaser's agent, that A is not to pay C for property bought by A of C. When C discovers that A is the buyer, he is not deprived of all the benefit of that fact by the undisclosed agreement *inter alios* that A is not to pay for what he buys. That agreement does not make the agent B the purchaser in fact, nor relieve the purchaser A from his part of the contract of purchase made with C. The agent, holding himself out as the purchaser, is estopped to deny, as against the vendor C, that he is the purchaser. But the secret agreement between the real purchaser and his agent, that payment is to be made by the latter and not by the former, is no part of the contract of purchase; it is merely an extraneous executory agreement *inter alios* to which the vendor is not a party. C is a party in the contract of purchase; and if A is the purchaser, he is liable to C because he is the purchaser. The fact that he is the purchaser is the material thing; the non-disclosure of that fact, so far as his liability is concerned is immaterial; his intention not to pay is as immaterial as it would be if he had held himself out as purchaser, and had omitted to disclose the fact that he intended not to pay.

The question whether A is a principal and B his agent, that is, whether A authorizes B to make the contract in his behalf, is often a difficult question of fact. And if B is a principal, the question whether A is a principal is the same, and may be as difficult as it would be if B were not a principal. If B is a principal, the question whether A is a principal is called a question of partnership: if B is not a principal, the question whether A is a principal is called a question of principal and agent or agency. The legal character of the question whether A is a principal is not altered by the circumstance that B is or is not a principal, nor by the circumstance that it is called in one case a question of partnership, and in the other a question of agency. And as that question is not affected by the name given it by the tribunal called upon to decide it, so it does not depend upon the name given it by A or B, or both of them. Through all forms and words, all arrangements, simple or complicated, all pretenses, true or false, all contrivances, honest or fraudulent, the law requires the tribunal to search for the substance, the meaning, the understanding and the fact; and this duty is the same whether B is principal or whether he is not.

Not only is A liable as a principal when, as a matter of fact, he is a principal, whether B is or is not a joint principal with him, and whether A is or is not known by the other party to be a principal — he may also be liable when, as a matter of fact, he is not a principal. The common-law rule, generally called the doctrine of estoppel, is applicable, and is applied to the liability of A as a principal in a contract made by B. If B is held out by A, or by his direction or consent, as his agent, A is liable as a principal: he is estopped to deny the existence of the state of things which he directly or indirectly induces another, or causes another to be induced to believe in and act upon. Though not a principal in fact, he is a principal in contemplation of law, because he is estopped to deny that he is a principal. Being estopped in law to deny that he is in fact a principal, is, so far as liability to creditors is concerned, practically the same as being a principal in fact. Causing another to act upon the belief that he is a principal, and that B is authorized to make a contract in his behalf, that is, is his agent for that purpose, he is estopped to deny the existence of the relation of principal and agent between himself and B — in other words, is estopped to deny B's authority — without regard to the question whether B is or is not a joint principal or copartner. The estoppel

operates in the same manner and with the same result: whether B is an agent merely (*Hatch v. Taylor*, 10 N. H. 538; *Towle v. Lavett*, 23 id. 360, 374) or an agent and also a joint principal. *Smith v. Smith*, 27 id. 244, 252. If A holds B out, or authorizes B to hold himself out, as his agent, the circumstance that B is or is not a principal is immaterial in the application of the doctrine of estoppel to A.

Here are two general elementary doctrines of the ancient common law, holding A liable as a principal on a contract made by B: 1. The doctrine of the liability of an actual principal, disclosed or undisclosed; 2. The doctrine of estoppel, which under certain circumstances makes a man a principal in law when he is not a principal in fact. The latter doctrine applied to this subject is merely one of the methods of ascertaining whether A is a principal. Both doctrines constitute the single doctrine of the liability of a principal. If A is in fact a principal, he is liable because he is a principal: if by the process of estoppel in law he is a principal, he is liable because he is a principal. And each of these doctrines or parts of a single doctrine has a legal operation and effect irrespective of the question whether B is or is not a joint principal or copartner with A. The application of these doctrines to the question of A's liability does not render it necessary to determine whether the question is one of agency or partnership, that is, whether B is an agent merely, or an agent and also a principal, because, whether B is or is not a principal, A is equally and for a single reason liable as a principal disclosed or undisclosed, and is equally and for a single reason estopped to deny that he is a principal. He is liable because he is a principal, or because he holds himself out or suffers himself to be held out as such. He is none the less nor for a different reason liable when B, being a principal, the question of A's liability is called a question of partnership: he is none the more nor for a different reason liable when B, not being a principal, the question of A's liability is called a question of agency: and the test of his liability is not more ambiguous nor anywise different when, it being uncertain whether B is or is not a principal, it is consequently uncertain whether the question of A's liability is to be called a question of partnership or a question of agency. If it is never settled whether B is a principal, and it is consequently never known by which of its possible names the question of A's liability is to be called, that question can be settled notwithstanding it is an

Eastman v. Clark.

anonymous one; and it must be settled on the same legal grounds as if its name were known. So far as the general legal test of A's liability is concerned, the two names of the question are synonymous. These legal rudiments every one expresses in language most satisfactory to himself. There is a choice of words. For instance, when B is a principal, and the question is whether A is liable as a copartner or joint principal with him, some may use the word "partner," and others may prefer the word "principal" whichever term is employed, the same thing is meant, and the same idea is accurately conveyed. But the use of some words in indefinite, ambiguous and opposite senses has involved the authorities in some apparent uncertainty and confusion. When A and B are not partners in fact, but are liable to certain creditors as partners in law by estoppel, they are partners as to those creditors, though not partners as between themselves: but the phrase "partners as to third persons though not partners *inter sese*, as sometimes used, signifies not "partnership by estoppel," but something too vague and visionary to be understood or discussed. "Profit," "profits as profits," "profits as such," "profits not as profits but as something else," "a share of the profits," "a community of interest in the profits," "a specific interest in the profits as a principal trader," "a specific interest in the profits with the right to an account," "a specific lien upon the profits," "taking part of the fund on which creditors rely for payment," "jointly concerned," and other common expressions relating to partnership liability, have, in the absence of clear, precise and fixed definitions, become a cause of perplexity. We need not dwell upon the many significations of "profit," or on any distinction between the uses of the word in political economy and in law. Story on Part., § 21, n. 1. For our practical purpose, a single illustration will suffice. Suppose B, going into the retail flour trade with no capital, hires A as clerk for one-ninth of the profit, buys 1,000 bbls. of flour of C at \$10 a bbl., sells it all at \$11 a bbl. in one month, in a store hired of D at \$100 a month, and the business is then closed. A, C, and D having received nothing, and B having the \$11,000, \$10,000 of that sum is to be paid to C for the flour. The remaining \$1,000 is the primary, gross, or sale profit. Deduct from that gross profit the \$100 due D for rent, and we have \$900, the profit out of which the deferred creditor A is to be paid for his services as clerk. Deduct from that deferred creditor fund one-

ninth of it due A, and we have \$800, the final or net profit of B, the principal. Until they are paid, A, C, and D are creditors. C and D stand on an equal footing as ordinary creditors; the fact that, in book-keeping, the debt to D for rent may be recorded in the expense account does not affect its existence as a debt; the debt to A for services may be recorded in the same account. C and D are general, absolute creditors, relying for payment on every thing until they are paid; then, ceasing to be creditors, they rely for payment on nothing. A is a deferred and contingent creditor, entitled to nothing until C and D are paid, and then entitled to nothing unless some of the gross profit is left. C and D, until they are paid, rely for payment on the whole of B's property,—upon the \$1,000 gross profit, as well as the rest of the proceeds of the flour. They do not rely on what may be left after they are paid. They do not rely on the \$900 (deferred creditor fund) left after they are paid, nor on the \$800 (net profit) left after payment of all creditors, general and deferred.

If C is first paid, he takes part of the fund on which D relies for payment; if D is first paid, he takes part of the fund on which C relies for payment; but the one first paid does not, by the act of receiving payment, become liable to the other for taking part of the fund on which they both rely. That is not the fund of which A is to have one-ninth; and he is not liable to C and D for not taking a share of the fund on which they rely. The fund of which A is to have one-ninth is the \$900 left after C and D are paid; on that fund C and D do not rely; and A is not liable to them for taking a part of the fund on which they do not rely. He is a creditor, though a deferred one; and as creditors, C and D do not become liable to each other or to A by properly receiving payment out of the fund on which they properly rely for payment, so A does not become liable to them by receiving payment out of the fund on which he relies.

But if A, as a joint principal and copartner, and not as creditor, is entitled to one-ninth of the profit, it is not profit that is meant; and if he is entitled to a part of the net profit, he is liable to C and D, not because he is entitled to a part of the fund on which they rely, for they do not rely on the net profit; he is liable to them because he is a principal. If he is a principal, "the profit" of which he is to have a part means the balance of gross profit left after paying all creditors; if he is a creditor, "the profit" means the balance of gross profit, left after paying all

creditors but himself. Whether, in a particular case, "the profit" carries the one meaning or the other, depends on the question whether he is a principal or a creditor, which is the first, last, and only question in the case. We cannot know in what sense "the profit" is used by the parties until we discover whether A is a principal or a creditor. How can that be a method of answering a question, which is a deduction from the answer, and cannot be known until the answer is obtained? If A is a creditor, he is none the more and none the less a creditor by reason of his being entitled, as a creditor, to one-ninth of "the profit;" if he is a principal, he is none the more and none the less a principal by reason of his being entitled, as a principal, to one-ninth of "the profit." When A and B agree that A shall have one-ninth of "the profit," they may mean that he is to have it in the capacity of, and by virtue of his being, a creditor; they may mean that he is to have it in the capacity of and by virtue of his being a principal. The question is, which do they mean? The sharing-profit test merely repeats that question without answering it. As A may be entitled to one-ninth of a fund called "profit," either in the capacity of a creditor or in the capacity of a partner, his ambiguous right is not a test of the capacity in which he holds it. Taking part of "the profit" is no more the test of his being a partner than it is the test of his being a creditor.

In the supposed case, where A is a creditor and not a partner, there are three different profit funds, or one profit fund of three different amounts and with three different names,—1, \$1,000 gross profit, out of which, as well as out of the other \$10,000, proceeds of the flour, the general creditors are to be paid; 2, \$900 deferred creditor fund left after payment of the general creditors, C and D; 3, \$800 net profit, left after payment of the general creditors, C and D, and the deferred creditor A. An agreement of A and B that A is to have one-ninth of the profit, means that A is to be a deferred creditor entitled to one-ninth of the gross profit left after payment of the general creditors as compensation for his services, or that he is to be a joint principal and copartner with B, entitled to one-ninth of the net profit. In the former case "the profit" means neither the gross profit nor the net profit, but the \$900, of which the \$800 left after payment of A is the net profit of the business in which B is sole principal. In the latter case, "the profit" means the \$900 net profit of the business in which A and B are joint princi-

pals. The difference is, not in the amount which A is to receive, but in the capacity in which he is to receive it. In the one case, as a clerk hired by B, and as a creditor of B, he is to receive from B in payment of his deferred debt, one-ninth of the amount of B's gross profits left after payment of other creditors. His right is a chose in action, not a thing actually or constructively in his possession. The title of the ninth is in B, and not in A, until he is paid. In the other case, as a joint principal, before he receives his share, he owns, in common with B, the net profit left after payment of all partnership creditors of A and B. The title is in A and B: A owns one-ninth, and B owns eight-ninths. In the one case, the net profit is \$800; A is a creditor of B, and not a principal; B owes him \$100 for wages, which he can recover in assumpsit at common law. In the other, the net profit is \$900; A is a joint principal, and not a creditor; B owes him no wages; their net profit cannot be ascertained and divided in a common-law action; for the debts contracted by B, within the scope of his authority as agent in earning that net profit, A would be liable, did not the existence of net profit show that those debts have been paid.

If A is clerk and creditor, he receives \$100, not as his share of the profit of a business in which he is a joint principal, but as compensation for his services in a business in which B is sole principal. He receives one-ninth of the profit, not as profit, but as payment of a debt. If A is a principal, he owns one-ninth of the profit as profit, and does not receive it as payment of a debt. The distinction between taking profit as profit, and taking it not as profit but as payment of a debt, is a familiar one, firmly established by the authorities, but not always explained as clearly as it might be. It is the distinction between a partner and a creditor obscurely expressed. Taking a share of the profit as profit, is taking it as his profit—as the profit of his flour business—as the profit of a principal—taking it in the capacity of a principal trader, an owner of the profit—a partner; taking a part of the profit as payment of a debt, is taking it in the capacity of a hired man or other creditor. If A is clerk and creditor, we mean by his share of the profit what is his when it is paid to him by his employer; but, until then, is his in a figurative sense only. If he is a clerk and creditor, what is called his share of the profits belongs, as a matter of absolute legal title, exclusively to B until he pays it to

Eastman v. Clark.

A, and then belongs exclusively to A. It does not, at any time, belong to A and B in common, or in any manner indicated by the ordinary signification of the terms "share of a partner." But, if A is a joint principal, "his share" is "the share of a partner" in the net profit. The indiscriminate use of the word "share," signifying the amount of his wages and debt, if he is a clerk and creditor of B, and signifying his ownership of a part of the profit in common with B, if he is a principal, is a cause of confusion. The distinction between the two significations of "share," is the distinction between a creditor and a partner.

"Jointly concerned in a transaction" (*Brown v. Cook*, 3 N. H. 64), and other explanatory terms often used to describe the relation of copartners, may be useful for that purpose. In this case, the jury might be properly instructed that all the defendants were liable, if they were "jointly concerned" in the contract made by one of them with the plaintiffs. The judge need not confine himself to the word "copartners;" he may say "joint principals." All the defendants were "joint principals" if they were "jointly concerned" in the contract as the parties to it on one side — as the purchasers of the corn — as the joint owners of the corn to whom the title passed from the plaintiffs. "Jointly concerned," if it means all that, means "joint principals." If it means any thing less, it is not a useful definition, but something that needs defining, and is of no use until it is defined. And the same is true of "a community of interest" in profits or other property, or in any contract or business. If "joint concern" and "common interest" are used as synonymous with the relation of "joint principals," and if they are so understood, it is immaterial which form of expression is employed; but such terms, used (as they often are) in a vague, undefined and undefinable sense, cannot be accepted as a test of any thing. What is wanted is, not a new legal language, but an accurate use of the old; not a novel doctrine, but a clear understanding of what is settled.

If A, by agreement with B, is to have "a share of the profit," meaning a part of the profit left after the payment of all debts, he is necessarily a principal, because he is either a principal or a creditor; and a creditor cannot be entitled, as a creditor, to a part of what is left after he is paid. Whether he is a principal or a creditor, depends upon the agreement between him and B. If they agree he shall have a part of "the profit," what do they mean by "the

profit?" If they mean the profit left after the payment of all creditors, they mean that A is not to be one of those creditors; and, not being a creditor, he must be a principal. But how are we to know whether they mean "the profit" in that sense, until we ascertain whether, in their meaning, A is to be one of those creditors: whose payment is the prerequisite and test of "the profit" in that sense? Put this in what form we may, it is all a reasoning in a circle, or a begging of the question, or a substitution of one of two synonymous questions for the other.

What difference whether A is to receive one-ninth as wages, or horse hire, or store rent, or interest of money loaned? How can a debt due him for one thing make him a creditor, and a debt due him for another thing make him a partner? What he is to receive as compensation for his own work or the work of his horse, for the use of his store or the use of his money, for knowledge and skill sold to B, or for goods sold to B—what he is to receive in the capacity of a creditor, he is not to receive in the capacity of a partner. All this is merely saying if he is a creditor, he is a creditor; if he is a partner, he is a partner. The question all the time is, whether he is a creditor or a partner; and to say the question is, whether he is to receive a part of the profit in the one capacity, or the other, is, not to invent a test for ascertaining the answer of the question; but merely to state the question in a form that involves it in some obscurity. Is he a creditor or a partner? That is the original question. Amend that question by inserting in it the so-called sharing-profit test, and the remodeled question is, is he to receive a part of the profit in the capacity of a creditor, or in the capacity of a partner? The experiments of ninety-eight years have failed to show that the verbal alteration is an improvement, or that it has any other effect than to bewilder the inquirer who starts with the supposition that it means something.

In the supposed case, A is either a creditor or copartner of B. He is to receive a part of what they call "profit," in the capacity either of creditor or partner. The combined authorities establish a sharing-profit test in this sense; if A is to have something in the capacity of a creditor, he is a creditor; if he is to have it in the capacity of a partner, he is a partner. The discussions of the last ninety-eight years began with that; and they have ended where they began. The difficulty now is, not to ascertain the result, but to discover what disputed point was supposed to be involved in the

debate, a difficulty not unfrequently found at the close of protracted controversies.

"Sharing profits," with the qualification "as a principal and not as a creditor," is useless as a legal test, because the qualification is a mere repetition of the question for the solution of which a test is sought; without that qualification it is useless because it is equivocal. In its literal and unqualified form, as shown by my brother SMITH, it is not consistent with, and cannot be founded upon, the general rules of law. If in that form it could be and were a test, it would exist as the creation of arbitrary and absolute authority. In examining the authorities, it is an advantage to begin with the supposed test wholly severed and detached from dim and indeterminate generalities, and placed apart by itself in contrast with the primary principles upon which the law of partnership liability is based. If we find an authority urging that an undisclosed principal or secret partner should be liable, we know that is accomplished without a sharing-profit test; if we find an authority working out a liability by estoppel, we know a sharing-profit test in that matter is irrelevant. If we find authorities apparently presenting or recognizing a sharing-profit test, the first question will be, in what sense is the test announced, and what is the meaning and effect of its exceptions and qualifications? If, upon a careful scrutiny, the so-called test of sharing profits, enveloped in and consolidated with its mass of exceptions and qualifications, when compared with the elementary doctrine of the liability of a principal disclosed or undisclosed, is found to be nothing more than a badly executed copy or paraphrase of that doctrine, or a *fac-simile* in disguise, the question in this case will be reduced to one of those contentions about words, which is not a legal controversy.

It has been supposed that a sharing-profit test, with diverse exceptions, qualifications and explanations, was, at one time, established by the authorities. It has been supposed that it was established in England in the latter part of the last century; that it was settled in the class of cases generally ranged under the leading case of *Waugh v. Carver*; that it was upheld until 1860, and that it was then overthrown by the decision in *Cox v. Hickman*. *Cox v. Hickman*, and the subsequent English cases, maintain that there is no such test; that the question of partnership liability is a question of the liability of a principal; that, so far as it is a question of law, it is governed by the general doctrines called law of

agency or law of principal and agent, when applied in a case of an agent and one principal, and called law of partnership when applied in a case where the agent is a joint principal; and that, so far as it is a question of fact, sharing profits is evidence tending to show that the sharer is a principal. From 1866 to the present time, that has been held to be the common law of England. But what was the meaning and effect of the English cases before 1860? This is an important question, for this reason among others, that, before 1860, the American authorities were generally intended to be a mere following of the English; and when we ascertain the meaning and effect of the English cases before 1860, we shall learn what the mass of American authorities were intended to be.

The civil law seems to have been largely the source of the common law of partnership; and it is agreed, by competent persons who have made due investigation (Story on Part., §§ 37, 50, 51, 62; Parsons on Part. 88; 2 Am. Law Rev. 6, 7), that the authorities of the civil law do not contain a sharing-profit test of partnership liability. No one seems to have supposed that such a test came into England from the continent. If it had been a rule of the civil law, that fact would probably have been discovered in the researches, and asserted in the discussions that have occurred in England during the last thirteen years. The English cases on the subject begin in 1775; at least, none have been found of an earlier date. They do not refer to such a test as a civil-law doctrine adopted in England, or as having been in any way established or recognized by any common-law authority before 1775. We may safely conclude that, if there is such a test, it originated at Westminster Hall, and was not fabricated before 1775. And, as nearly if not quite all the important common-law rules that have been introduced within the last hundred years can be traced to the time and place of their origin by authentic records, and as a sharing-profit test, if it ever existed, has been introduced within that period, we should expect to find, with a satisfactory degree of certainty, when, where, and by whom it was introduced, on what occasion, under what circumstances, for what purpose, in what signification, and with what exceptions, qualifications and explanations.

Of *Bloxham v. Pell*, a *nisi prius* case, we find an account in *Grace v. Smith*, 2 Wm. Bl. 998, 999. It was tried before Lord MANSFIELD, in the King's Bench, at the same sittings at which *Grace v. Smith* was tried before DEGREY, C. J., in the Common

Pleas, March 7, 1775. Pell and Brooke had entered into a partnership for seven years, but at end of one year agreed to dissolve it, but no express dissolution was had. The agreement to dissolve recited that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at five per cent, which bond was accordingly given; and it was further agreed that Brooke should pay to Pell, in addition to five per cent interest for the use of his capital left in the business (five per cent being the legal rate; *Jestons v. Brooke*, Cow. 793, 796), the sum of £200 a year for six years, if Brooke so long lived, as in lieu of the profits of the trade; Pell to have liberty to inspect the books. Brooke became a bankrupt, and this action was brought for a debt incurred by Brooke in the course of trade. "Lord MANSFIELD held that Pell was a secret partner," on this ground: "This was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it shall not lie in the defendant Pell's mouth to say it is usury and not a partnership."

Pell was either a creditor of Brooke or a joint principal with him. If he was a creditor, his contract was usurious and criminal; and MANSFIELD held that he should not be allowed, even in self-defense, to claim the position of a criminal creditor, and that, there being no other position he could occupy but that of principal, he must be considered as a principal. In *Hoare v. Dawes*, 1 Doug. 371, 372 (in the year of 1780), MANSFIELD repeated the same peculiar theory, saying of "dormant partners" (meaning undisclosed partners), "they are liable when discovered, because they would otherwise receive usurious interest without any risk." Although this process of turning all creditors having usurious claims against any person into joint principals, copartners and codebtors, liable with their debtor to his other creditors, was repudiated by the court in *Grace v. Smith*, when *Blocham v. Pell* was cited and much relied on by the plaintiff; and although it never was law and has nearly passed into oblivion, it is still of some value as showing what erratic ideas of partnership liability could prevail in high places. When MANSFIELD could think an undisclosed partner is liable for the debts of the firm of which he is a member, not for the simple reason that he is a member (that is, a principal), but because, if he

were not liable, his profits might be more than a creditor's legal interest, it would not be surprising if other judges were found entertaining, or, at least, reported as expressing, loose notions on the same general subject. *Bloxham v. Pell* is also of value, because it exhibits the petitions of a partnership principal and a partnership creditor in striking contrast, and cogently presents the alternative of forcing a defendant into the one position or the other, without any reference to a sharing-profit test, as to which MANSFIELD's erroneous usury test affords no light.

The case *Grace v. Smith*, 2 Wm. BL 998, was, in its facts, very similar to *Bloxham v. Pell*; but DEGREY, instead of making the defendant a partnership principal by MANSFIELD's usury test, left the case to the jury, who found a verdict for the defendant. What instructions were given them does not appear. The plaintiff moved for a new trial on the ground of the verdict "being contrary to law and evidence." As no exception was taken to any ruling made or instruction given at the trial, the only question was, whether there was any evidence for the defendant competent to be submitted to the jury, or whether the verdict was against the evidence. The court (DEGREY, C. J., and GOULD, BLACKSTONE and NARES, JJ.) unanimously refused to grant a new trial. The decision is authority on no other point than this: there was no reason to disturb the verdict by which the defendant was held not liable for partnership debts. But there are certain *dicta* in the decision which have been supposed to be the origin of a sharing-profit test. Concerning the value of these *dicta*, it is to be observed that when the court took time for consideration, BLACKSTONE, in his reports, in accordance with the custom of English reporters, was careful to record the fact; and that the decision in *Grace v. Smith* was probably made, and the *dicta* thrown out orally, without any deliberation before or after the brief argument, and as soon as counsel sat down. A reporter's memorandum of the unpremeditated and unguarded utterances of even the highest tribunals does not always carry a high degree of authority. 1 Burrow (preface), ix. When the case came up for argument before the whole court, "DEGREY, C. J., reported that this was an action brought against Smith alone, as a secret partner with one Robinson." BLACKSTONE's report of the decision is as follows:

"DEGREY, C. J. The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade

Eastman v. Clark.

ought also to bear his share of the loss. And if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo* or *left behind* in trade, by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on these profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade of usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial.

GOULD, J., same opinion. BLACKSTONE, J., same opinion. I think the true criterion (when money is advanced to a trader) is, to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a *loan* (whether usurious or not is not material to the present question), in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount. "NARES, J., same opinion. "Rule discharged."

The question of fact which the jury had answered in favor of the defendant was, whether the defendant Smith was a creditor or a copartner of Robinson. Whether a partnership relation between them was disclosed or undisclosed was, as the law is now settled, an immaterial question; and DEGREY's remarks concerning a "secret partner" were made, apparently, because, in 1775, the liability of an undisclosed partner was not so well understood as it now is, and it was thought necessary to give some other reason for holding such a partner liable than the fact that he is a partner. DEGREY begins by suggesting this other reason: "Every man who has a share of the profits of a trade ought also to bear his share of the loss." This is a free translation of a rule of the civil law, and must be presumed to be given with the civil-law signification of the

original, which has no reference to a sharing-profit test of liability to partnership creditors, but is based upon the admitted fact of partnership, and is a presumption regulating the rights and obligations of acknowledged partners, as between themselves, "in the absence of all contrary stipulations. Story on Part., §§ 19, 20, 24, 25, 26. "*Sicuti lucrum, ita damnum quoque commune esse oportet. l. 52, § 1, in f. eod. Societas cum contrahitur, tam lucri, quàm damni communio initur. l. 67 eod.; l. 52, § 4, in f. eod.; 1 Domat (2d Eng. ed.), 142.*

Pothier, treating of "what natural equity requires in the contract of partnership," as between the partners, gives this as the first rule: "In order that the contract of partnership may be equitable, it is generally necessary that the share assigned by it to each of the partners, in the anticipated profits, should be in proportion to the value of what each of them has brought into the partnership;"—and this as the "second rule:" "Generally each of the partners ought to bear the same proportion of the losses of the partnership, as he ought to have of its profits in case it is prosperous." Pothier on Part. (Tudor's translation) 11, 15. The subject is fully discussed in Story on Part., ch. 3. In 1788, Lord LOUGHBOROUGH (DEGREY's successor), thinking it necessary to give some other reason for the liability of "the secret partner" to the partnership creditors than the fact that he is a partner, said the reason is, "that, if a partner shares in advantages, he also shares in all disadvantages." *Coop v. Eyre*, 1 H. Bl. 37, 48. And when DEGREY, speaking of the liability of "a secret partner," as if it were something different from the liability of a known partner, or must stand on some peculiar ground, or needed the support of argument on account of the non-disclosure of the partnership relation, said, "Every man who has a share of the profits of a trade ought also to bear his share of the loss," we can understand his argument, though it would be considered an unnecessary one at the present day. A partner, disclosed or undisclosed, entitled to a share of the profit, if any is made, ought generally to bear a share of the loss, if any occurs; and it would be presumed that such was the partnership contract if there were no express agreement on the subject. "It is but fair that the chance of gain and of loss should be taken by the same persons; and it is natural to suppose that such was their intention, if they have said nothing to the contrary." 1 Lindley on Part. 13 (1st ed.). That is a rule of reason and nat-

ural justice, and a maxim of the civil law, which DEGREY, supposing some other reason than the fact of his being a partner was necessary for charging an undisclosed partner, might well invoke, as LOUGHBOROUGH did, thirteen years afterward. By "every man who has a share of the profits," DEGREY meant, what LOUGHBOROUGH said, every partner—a partner of any description—not excepting the undisclosed one whose liability he was explaining. By "profits," in that clause, he would have meant net profits, if the distinction between gross and net profits had been in his mind, as it probably was not.

The third sentence, "And if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment," connected with the preceding sentence as it is by "and," was probably intended as a mere continuation of the previous reasoning for holding "a secret partner" liable, notwithstanding the secrecy or non-disclosure of the partnership relation. The reporter's minute of the oral opinion appears to be abbreviated and imperfect; and no absurd meaning ought to be put upon it by strict construction or verbal criticism. The reported third sentence, read by itself, without the connecting "and," and without reference to the context or the subject of the liability of "a secret partner," of which the chief justice was speaking, can be made to mean, and has been supposed to mean, that "if any one," principal or creditor, takes a part of the profit, he is liable as a principal to all the creditors, because he takes part of the fund on which they rely for payment. In regard to this interpretation it may be remarked in the first place that a partner, disclosed or undisclosed, is liable to the creditors whether he takes a part of the profit or not; but in the time of DEGREY it was thought necessary to say that an undisclosed partner was liable because it was just, as between him and his copartner, in the absence of express stipulation to the contrary, that, having a share of the benefit, he should bear a share of the burden. In the second place, the net profit is the balance of gross profit left over and above the capital after deducting all losses and expenses, and paying all creditors; and upon that fund it is impossible for the creditors to rely. They cannot rely for payment on what is to be left, or what is left after they are paid. That is the only fund they do not rely on.

If it were possible for a creditor to rely for payment upon, and to be paid out of what is left after he is paid, what predicament would

he be thrown into by receiving payment out of that fund? According to one interpretation of the report of DEGREY's opinion, by taking part of that fund — by receiving payment out of the fund he had a right to rely on and to be paid out of — a creditor would instantaneously become liable to all the other creditors; and the moment each of the others received payment out of the same fund he would become liable in like manner. Receiving payment of debts out of a proper fund would be more hazardous than giving credit. Collecting debts might be more ruinous than losing them. The only safe course for creditors would be not to collect their debts out of the fund, whatever it was, on which they properly relied for payment. Fortunately the transformation of a creditor, by the payment of his debt out of the net profit, into a partnership principal and debtor liable to all the other creditors is impossible.

If, by the true interpretation of DEGREY's opinion, *Grace v. Smith* were an authority for such an impossible transformation, it would be sufficiently disposed of without going any further. The first three sentences of the fragmentary report of the *dicta* of DEGREY are the foundation on which all the authorities supposed to favor a sharing-profit test are based. That case is and is regarded by all the authorities as the one in which the supposed test originated; and it should have been treated as the leading case instead of *Waugh v. Carver*. The whole argument, so often reiterated from 1775 to the present time in favor of such a test, has been a mere repetition of the supposed meaning of the reported remark of DEGREY, "And if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment." Who is "any one," and what is "the profit?" A creditor is "any one;" and the balance left, over and above the capital, losses, expenses and debts of every kind, is "the profit" in a certain sense. If it is urged that DEGREY meant that creditor A should be liable to other creditors because he is paid or is to be paid out of what may be left after he is paid; that this doctrine was approved by the English authorities from 1775 to 1860, and by the American decisions to the present time; and that is a settled rule of law which nobody but the legislature can change — it is answer enough to say that neither DEGREY nor any one else could have meant any such thing; that if DEGREY and everybody else have inadvertently used a formula which, upon investigation, is found to be capable of no other meaning than that it is certain they did not

use it in that sense, and, therefore, we have their authority for not using it in that sense; that, if they did not use it in any other sense, we cannot, upon their authority, either use it in any other sense, or use it at all; and that, if they did use it in some other sense, we are not called upon to accept or reject that other sense before it is discovered. To use the formula in a sense in which we know the authorities could not have intended to use it, would be an irreverent and revolutionary perversion and overthrow of precedent. If it could be shown that DEGREY and all the venerated authorities of the last hundred years meant that creditors rely for payment on what is left after they are paid, it would require no great courage in this age to say that we do not propose to assert our belief in a dogma that is either preposterous or unintelligible.

"And if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment." In whatever sense DEGREY used the word "profit," he did not mean that a creditor, relying upon and paid out of the "profit" or any other fund, is, by such reliance and payment, transformed into a copartner with his debtor, and made liable to all the other creditors. Twice in his brief opinion he distinctly recognizes the right of a creditor to rely on "profits" for payment (including, of course, the right to be paid out of the "profits" relied on), without thereby becoming liable as a partner. By "any one" he did not mean a creditor. Whom else could he mean but a partner? If by "profit" he meant gross "profit," that is not the fund generally referred to when partners agree "to share the profits." If by "profit" he meant net "profit" — a balance of gross "profit" left after all creditors are paid — who but a sole principal or a partner can take a part of that fund? If, by "profit," he meant a balance of gross profit left after the payment of all creditors except those deferred ones who are to be paid out of that balance; and if he meant that such deferred creditors are liable to those not thus postponed, the contrary doctrine is too firmly established by an overwhelming preponderance of the subsequent authorities, English and American, to be now questioned. 3 Kent's Com. 25-33; Collyer on Part., §§ 39-44; Story on Part., §§ 32-49; Parsons on Part. 81-85, n.; *Berthold v. Goldsmith*, 24 How. 336, 543; *In re Francis*, Pacific Law Rep., Dec. 17, 1872 (U. S. Dist. Ct. of Oregon).

What DEGREY meant is to be ascertained, not by a literal and

ridiculous interpretation of some dark passage in the fragmentary report, but from some rational sense of his whole opinion. Taking the third sentence in connection with the reason he was giving for holding "a secret partner" liable (with which it is visibly coupled by "and"), and with the rest of the opinion, and making due allowance for the inaccuracy of a hasty memorandum made by one man of an extemporaneous effusion of another, the general drift of the whole is plain enough, and is plainly opposed to a sharing-profit test in any other sense than sharing profit in the capacity of a principal. The terms "profit" and "profits" he apparently used without any discrimination between gross and net profit. The general and uncertain idea of profit, indefinite as it is in the report, is no more indistinct than ideas are apt to be under similar circumstances, but more so than it would have been had its influence been foreseen. To give clearness and precision of thought and expression to what he is reported to have said about profit would now be an unauthorized alteration, likely to impose a meaning and produce results not contemplated by the author.

Some notion of a creditor relying on profit seems to be presented three times in his opinion, the last time in a formal summing up and explicit statement that leaves no doubt what his test of the defendant's liability was, however cloudy the reported theory of creditors relying on profits. "I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment." Here is presented (with an undefined and undistinguishing idea of the "profits") the right of a partner "to share the profits," in contrast with the right of a creditor to rely "on those profits as a fund of payment." If Smith "only relied on those profits as a fund of payment" — "payment" implied the relation, not of joint principals, but of debtor and creditor between Smith and Robinson, and a debt to be paid to Smith by Robinson out of Robinson's property. But if Smith "agreed to share the profits of the trade with Robinson," that is, to own them in common with Robinson before they were divided, and to divide them as their joint property into shares, and not to receive a share of Robinson's "profits" in "payment" of a debt, "to share the profits," in that sense, implied the relation, not of debtor and creditor, but of joint principals. Parsons on Part. 73, *n*. This contrast was DEGREY's "true criterion" of the defendant's liability. He merely stated

Eastman v. Clark.

the question — creditor or partner? in the form in which it seemed to him to arise in that case. That question was his test. He made no distinction between “partners *inter sese*,” and “partners as to third persons.” The defendant had not aided Robinson in getting credit from the plaintiff by holding himself out or suffering himself to be held out as a partner; and therefore, as he was not estopped to deny that he was a partner, the question of “partner as to third persons” did not arise. “This was an action brought against Smith alone as a secret partner with one Robinson.” The plaintiff’s claim was that the defendant and Robinson were partners *inter sese*, though their partnership relation was not disclosed. The defendant was liable to the plaintiff if he was in fact a copartner of Robinson as between Robinson and himself; if he has not such a copartner, he was not liable. If he was to receive something from Robinson in “payment” of a debt, he was a creditor; if he was “to share the profits of the trade with Robinson,” not in “payment” of a debt, he was a partner. Whether he was a creditor or partner depended upon their agreement, that is, their understanding. If they understood he was a creditor, he was a creditor; if they understood he was a partner, he was a partner. What they understood was a question of fact which the jury had decided in favor of the defendant; and there was “no foundation for granting a new trial” on the ground of the verdict being contrary to the evidence. This is the gist of DEGREY’s opinion; and it is decisive against a sharing-profit test in any other sense than sharing profit in the capacity of a joint principal and copartner, as distinguished from the character and position of a creditor.

“If,” says DEGREY, “any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade.” If the defendant, as a partner, left his money in the business, he had the “specific lien” of a partner “upon the profits;” that is, the profits, being owned in common by him and Robinson, could not be diverted to the payment of Robinson’s private debts, to the damage of the defendant. If, as a creditor, he lent his money to Robinson, he lent it on Robinson’s “general personal security,” and he had “no specific lien upon the profits,” although he was “interested in those profits” (gross profits), because he relied “on them for repayment,” as he relied on the rest of Robinson’s property. The “specific lien” here spoken of is the lien or title of a partner. Upon all the partnership

property, a partnership creditor has such a lien as gives him a preference over the private creditors of the partners, which the law will enforce. The "specific lien" or right of a partner in any partnership property, capital or profits, the partner can enforce himself by holding possession without process of law. The "specific lien," or right of a partner in the partnership property, is put by DEGREY in contrast with the "general personal security" on which "any one," in the capacity of a creditor, "advances or lends money to a trader." He alludes to "specific lien," not as a test, not as a fact the easy proof or disproof of which answers the question — creditor or partner? but as a consequence and partial description of the partnership relation. He merely says that one who becomes a creditor by loaning money has "no specific lien upon the profits" of his debtor. This statement has been taken as a declaration that a "specific lien upon the profits" is a test of partnership liability. Such a test is as uncontrovertible as any other right, power, obligation or attribute of a partner. It amounts to this: he who has the "specific lien" of a partner is a partner. It is one of the numerous ways of saying a partner is a partner. DEGREY's remark about "specific lien" was a mere reference to one of the contrasts between a creditor and a partner, a mere illustration of the difference between them, which difference was his test of the defendant's liability to the plaintiff.

BLACKSTONE, J., made no distinction between "partners *inter sese*" and "partners as to third persons," but held that, as between the defendant and Robinson, their chances of loss and profit ought to be equal and reciprocal. In the absence of an express stipulation on that point, it would naturally be presumed that they understood their chances of loss and profit were to be equal and reciprocal. "Every man who has a share of the profits of a trade ought also to bear his share of the loss," said DEGREY, repeating the civil law. "*Illud expeditum est, si in una causâ pars fuerit expressa (veluti in solo lucro, vel in solo damno) in altera verò omissa: in eo quoque quod prætermisum est, eandem partem servari.* Sec. 3, *inst. de societ.*" 1 Domat (2d Eng. ed.), 142. Many inferences of fact are laid down in the authorities of the civil law, because under that system questions of law and fact being decided by the court without a jury, there is little occasion to preserve the distinction between law and fact, which is indispensable under the common-law system of a court to decide the law, and a jury to decide the facts.

Eastman v. Clark.

BLACKSTONE, recognizing the question — creditor or partner? as the ultimate inquiry; seeking for nothing but the understanding of the defendant and Robinson on that question; not constructing “a partnership as to third persons” out of a creditorship *inter sese* — inferred from the defendant’s “profit or premium” being a limited and certain sum that they understood he was not to be a partner liable for an unlimited amount of debts. That was a fair inference of fact, and a proper one for the court to draw in a case like *Grace v. Smith*, where the question was whether the verdict was against the evidence.

In *Hoare v. Dawes and ano.*, 1 Doug. 371 (1780), the ground of action was, that the defendants, who, with others, had employed a broker to buy tea, were liable as partners. The verdict was for the defendants. Lord MANSFIELD, before whom the case was tried, reported the evidence for the consideration of the whole court, on a motion for a new trial. And the court, weighing all the evidence, and coming to the conclusion that, as a matter of fact, the defendants were not partners with the others, were satisfied with the verdict.

In *Coope and ano. v. Eyre and ano.* 1 H. Bl. 37 (1788), is an authority against a literal and unqualified sharing-profit test; and also goes far to show that *Grace v. Smith* is opposed to such a test. It appeared at the trial that “the defendants, *Eyre* for himself and partners (who were *Atkinson* and *Walton*, general merchants), *Hattersley* for himself and *Stephens*, who were oil merchants, and *Pugh* for himself and son, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. That *Eyre* should be the ostensible buyer, and the others share in his purchase at the same price which he might give. *Hattersley & Co.* were to have one-fourth, *Pugh* one-fourth, and *Eyre & Co.* the remaining moiety; that they bought large quantities of oil belonging to other ships and other traders besides the plaintiffs, in the name of *Eyre & Co.*; that *Hattersley* and *Pugh* occasionally came forward and gave directions as to the delivery of the oils, and otherwise interfered in the transaction, and also made many declarations ‘that they were all jointly interested in the different purchases, and that there was a general concern between them.’ * * Lord LOUGHBOROUGH, after declaring his opining (that, as the defendants did not appear to have been jointly concerned further than the purchase of the oil, they had not such a joint interest in the *profit and loss* as the

law made necessary to a partnership), directed a verdict to be found for them, which was accordingly done." GOULD, J., in his opinion, speaks of "the jury having found for the defendants." Whether the verdict was ordered, or the jury adopted LOUGHBOROUGH'S opinion distinctly announced to them, is not important. English judges sometimes, without absolutely ordering a verdict, express their opinion of the evidence alone, or of the evidence and law together, in a positive manner that is practically equivalent to ordering a verdict; and sometimes, in such and in other cases, on motions for new trials, the distinction between conclusions of law and conclusions of fact is not clearly recognized.

In the argument of a motion for a new trial, in *Coope & ano. v. Eyre and ano.*, it was asserted by the defendants that, "in *Hoare v. Dawes and Grace v. Smith*, it is established as essential to a partnership, either that there should be a contract to share profit and loss, or that the parties should offer their joint credit to the vendor." The plaintiffs "admitted that a participation of profit and loss was necessary to constitute a partnership, and argued that this was a contract of that nature." GOULD, J. (one of the judges who decided *Grace v. Smith*), said, "I think the true criterion is as stated by Mr. J. BLACKSTONE, in the case of *Grace v. Smith*, 'whether they are concerned in profit and loss;' and the same doctrine is in effect held by Chief Justice DEGREY in that case." Finding the fact to be, upon the evidence, that the defendants were not jointly concerned in profit and loss, he said, "In this light I am of opinion there is no foundation for the court to adjudge the present case a partnership; and the jury having found for the defendants, that there is no reason to disturb the verdict." HEATH, J., said, *Eyre & Co.* are the only purchasers known to the plaintiffs; entire credit was given to them alone. *Pugh, Hattersley and Stephens* can be liable only in the event of a concealed partnership, on this principle, 'that the act of one partner binds all his copartners, on account of the communion of profit and loss.' He found upon the evidence there was no such communion, quoted a passage from the civil law in support of *Hoare v. Dawes*, and concluded against a new trial. WILSON, J., was of opinion a new trial ought to be granted, on the ground that the verdict was against the evidence, which tended to show that the defendants, by their conduct and statements, had admitted themselves to be joint principals. He said, "The contract was actually made between the plaintiff and *Eyre & Co.*; but if

Eastman v. Clark.

the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted. That they were so concerned, sufficiently appears from the contracts with the other merchants, and their own declarations; these, I think, were proper to be given in evidence, being against themselves, to which evidence the verdict was contrary. The defendants were all concerned in a general speculation. There was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was, there is no evidence precisely to prove, no witness having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? Surely, from the declarations of the parties themselves." He then reviewed the evidence showing admissions of defendants who contested the suit that they were joint principals, referred to "such a participation of profit and loss as will make a partnership;" and remarked, "in *Grace v. Smith* the terms of the contract (between Smith and Robinson) were stated; if the terms of this contract had been stated, we might have judged of the responsibility of the defendants; but not being stated, we must receive their own acknowledgments of responsibility."

LOUGHBOROUGH, C. J., said he still continued to think the defendants were not liable as partners; "the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership. * * In order to constitute a partnership, a communion of profits and loss is essential. The shares must be joint, though it is not necessary they should be equal. * * * Eyre was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. * * * In the transaction in question (with the plaintiffs) there was not that communion between them necessary to make them partners."

"Communion of profit and loss" is civil-law language, and means a certain condition of partnership that is presumed, in the absence of a stipulation to the contrary (1 Domat, 1, 8, 1, art. 8, 9; Story on Part., § 62), as between the partners, without regard to third persons. *Sicuti lucrum, ita damnum quoque commune esse oportet. Societas cum contrahitur, tam luctus, quam damni communis initur.* LOUGHBOROUGH had not forgotten the civil law which he had studied and practiced in Scotland. *Coope and ano. v.*

Eyre and ano. shows that in 1788, the Court of Common Pleas (their attention being particularly called to *Grace v. Smith*, decided in that court thirteen years before, and one of the judges who decided it still remaining on the bench) did not understand that a literal and unqualified sharing-profit test had been established in that or in any other case.

"A partnership is a joint understanding to share in the profit and loss." If there is no estoppel, the question is whether the defendants "considered themselves as partners." *Saville v. Robertson*, 4 D. & E. 720, 727, 728. When ASHHURST, J., in that case, speaking of the liability of "dormant partners," says: "There the party furnishing the goods may resort to all those who are entitled to share in the profits; for though in such case the dormant partners may not be known at the time of the contract, yet," when discovered, they are liable — he does not lay down a sharing-profit test in conflict with his definition of a partnership, "a joint undertaking to share in the profit and loss." "To share in the profits" was an elliptical repetition of his previous expression "to share in the profit and loss." Sharing profit and loss is a different thing from sharing profit, when the sum of the losses exceeds the sum of the profits.

"Though, in point of fact, parties are not partners in trade, yet, if one so represents himself, and by that means gets credit for goods for the other," both are liable. *De Berkow v. Smith*, 1 Esp. 29 (1793).

In *Waugh v. Carver*, *Carver and Giesler*, 2 H. Bl. 235 (1793), under written articles of agreement between the defendants, Giesler "removed from Plymouth and settled at Cowes, where he carried on the business of a ship agent, in his own name, and contracted for the goods, etc., which were the subject of this action." "A verdict was found for the plaintiff, subject to the opinion of the court, on a case which stated" the articles of agreement. "And the question was whether the defendants were partners on the true construction of the articles." The Carvers were to continue their business of ship agents at Portsmouth; and certain profits of the business at both ports were to be divided between the defendants in certain proportions. There was a stipulation that neither of them should be affected by any loss that might happen to the other, or be answerable for the acts of the other. The court consisted of EYRE, C. J., and GOULD, HEATH and ROOKE, JJ. The Chief Jus-

Eastman v. Clark.

sice delivered an opinion, in which GOULD and HEATH concurred. ROOKE, having been counsel, did not sit. GOULD was one of the judges who decided *Grace v. Smith*; and GOULD and HEATH had delivered opinions in *Coope v. Eyre*.

The Chief Justice begins by saying that, if there were an annuity granted out of a banking-house, to the widow, for instance, of a deceased partner, it would not make her liable to the debts of the house. This can mean no more than that an annuitant is not necessarily a partner. A partner might stipulate for an annuity instead of any other form of benefit. But an annuity is not a common kind of partnership interest; and the widow of a partner does not usually take his place in a banking-house. In the supposed case, the annuity, the nature of the business of the house, and the sex of the annuitant, would be circumstances tending to show that she was a creditor and not a partner.

The second part of EYRE's opinion relates to estoppel. "The definition of a partnership cited from PUFFENDORF is good as between the parties themselves, but not with respect to the world at large. If the question were between A and B whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labor, and on what agreement they were to divide the profits of that contribution. But in all these cases a very different question arises, in which that definition is of little service. The question is generally, not between the parties as to what shares they shall divide, but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing."

The third part of the report of EYRE's opinion has caused this case to be considered a leading one. In its general tone, this third part is a continuation of his previous statement of estoppel. If his

remarks were accurately reported, he said: "It is plain, upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. * * * That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves and did not mean to take a moiety of the profits of Giesler's house agreed upon for the settlement of their accounts. That they have generally and indefinitely, as they should arise, at certain times done so is clear upon the face of the agreement; and, upon the authority of *Grace v. Smith*, he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. * * If, therefore, the principle be true that he who takes the general profits of a partnership must of necessity be made liable to the losses in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For, though, with respect to each other, these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world. I am, therefore, of opinion that there ought to be judgment for the plaintiff."

In Massachusetts, in 1821, this third part of EYRE's opinion seems to have been regarded the same as the second part—as the doctrine of estoppel, and nothing more. "It is there (in *Waugh v. Carver*) stated by EYRE, O. J., that 'he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable for losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security for the payment of their debts.' This remark, as a general observation, is true. It may be that as between the parties no partnership exists; and yet that they may have conducted themselves in such manner as to have induced others to believe that such a partnership existed, and to give credit accordingly. In such

Eastman v. Clark.

a case they are not to be protected by their private agreement that one shall not be answerable for the other." *Rice v. Austin*, 17 Mass. 197, 205. If this was all EYRE meant, there is no difficulty in the authorities. But, if *Waugh v. Carver* is fully and accurately reported, it would seem that he meant something more or less than estoppel.

The apparent meaning of the report is that, as "between the Carvers and Giesler," "they were not nor ever meant to be partners;" that, "upon the authority of *Grace v. Smith*, he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts; that was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason;" and that, "though with respect to each other these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world." According to the report, EYRE professed to follow "the authority of *Grace v. Smith*," and "the principle" which "was the foundation of the decision in *Grace v. Smith*." He intended to invent no new law. He meant to be governed absolutely by a particular precedent, and "the principle" of that precedent. He distinctly stated that precedent and "the principle" of it. He is not to be charged with the introduction of new law when he avowed his passive obedience and implicit submission to authority. The doctrine which he reverently accepted was "the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." He said that was the doctrine of *Grace v. Smith*, and he thought it stood "upon the fair ground of reason." It will be quite time enough for us to accept or reject this doctrine when we are informed what it is — what DEGREY meant by it, and what EYRE supposed DEGREY meant. When there is but one creditor, the question does not arise; the question arises when a defendant, as well as a plaintiff, claims to be a creditor. If there are several creditors, every one of them (except the one last paid) who takes a part of the fund, capital or gross profits on which he relies for payment, takes a part of the fund on which other creditors (one or more) rely. As to net profit, creditors do not rely for payment on what will be or

what is left after they are paid. It is apparent, therefore, that DEGREY did not mean, and that EYRE did not suppose DEGREY meant, that a creditor, taking capital or profits in payment of a debt, and thereby taking a part of the fund on which other creditors rely, becomes liable, by that act for that reason, to those other creditors.

"The foundation of the decision in *Grace v. Smith*" was, that the question, creditor, or partner? was the test of the defendant's liability to the plaintiff, and that that question did not appear to have been erroneously decided by the jury in favor of the defendant. The dark-reported saying of DE GREY about taking a part of the fund on which creditors rely, whatever archæological interest it may possess, would be uninteresting if it were now put forth for the first time. As a literary curiosity, it may receive some attention; as a legal proposition, its meaning and value have never been satisfactorily made out. It is no matter of wonder if, occasionally, a loose, unconsidered, extemporaneous remark of a fallible judge, as understood, abridged, and hurriedly thrown upon paper by an unofficial, volunteer reporter, who perhaps did not "write shorthand, nor very quickly" (1 Doug. x, *preface*), is, upon critical examination, found unintelligible.

Decided in the same court, and reported in the same volume with *Waugh v. Carver*, is the case *Benjamin v. Porteus*, 2 H. Bl. 590. The question is, whether one Bennett, a broker, who was to have a share of profit, is a competent witness, or whether he is rendered incompetent by being a partner. It is argued on one side, that "he was to have a profit on the sale, not as a broker, but as a partner;" and on the other side, that he "was nothing like a partner, as there was no communion of profit and loss." The court, deciding the question by the weight of the evidence, is divided in opinion. EYRE, C. J., thinks "here the agent takes a profit in fact as a principal;" HEATH and ROOKE, JJ., think he takes it "as a broker, and not as a principal." This case is important, not as an authority on the test of partnership liability, but as showing that EYRE (as well as DEGREY) recognized the distinction between taking profits "as a principal," and taking them as a creditor. And when, in *Waugh v. Carver*, he repeated DE GREY's remark about taking profits, and when it is apparent he did not mean taking profits as a creditor, what could he mean but taking them as a principal? If that is his meaning, there is no difficulty

Eastman v. Clark.

in the authorities. The objection to this explanation is, he is reported to have said that, as between the defendants, "they were not nor ever meant to be partners;" but this was said with reference to, and as synonymous with, the next sentence, "they meant each house to carry on trade without risk of each other, and to be at their own loss." He might have meant that, *inter sese*, they were not partners in the sense of being, *inter sese*, chargeable with the losses of both houses, although they were principals who jointly carried on the business of both houses. He might have meant that persons are not fully and strictly partners (according to the common understanding and practice of partnership), unless, *inter sese*, their losses are joint; that when, *inter sese*, their losses are not joint, they are partners only in a qualified and peculiar sense; and this would be so if "a communion of profit and loss" is a correct definition of partnership.

This explanation has the support of high authority. In *Cox v. Hickman*, 9 C. B. (N. S.) 47, 92, 95 (1860), Lord CRANWORTH said, "A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for and on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say, that his right to share of the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is, to say that the same thing that entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, i. e., that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made. * *

I can find no case, in which a person has been made liable as a dormant or sleeping partner, in which the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when therefore he would stand in the position of principal toward the ostensible members of the firm as his agents. This was certainly the case in *Waugh v. Carver*, 2 H. Bl. 235. There, Messrs. Carver, who were ship agents at Portsmouth, agreed with Giesler, a ship agent at Plymouth, that, if he would establish himself as a ship agent at Cowes, they would share

between them the profits of their respective agencies in certain stipulated proportions. When, therefore, Giesler, in pursuance of the agreement, did establish himself at Cowes, and there carry on the business of a ship agent, he in fact carried it on for the benefit of Messrs. Carver as well as of himself; and the court held that, in these circumstances, the stipulation which they had entered into, that neither party to the agreement should be answerable for the acts of the other, was a stipulation which they could not make, so as thereby to affect third persons. Each firm was carrying on business on account, not only of itself, but also of the other firm; this, therefore, made each firm the agent of the other."

By "taking a part of the profits," DE GREY and EYRE may have meant (if their meaning reached a mature and definite shape) "taking a part of the profits as a principal;" and their idea of creditors relying on profits for the payment of their debts may have been a generality too crude, superficial and vague to be practically applied to the details of evidence, or to any specific point of a case. Whatever they meant, it is certain they did not mean that a creditor relies on or takes a part of the net profit left after he is paid, or that a creditor, taking part of the gross profit, as a creditor, in payment of his debt, thereby becomes liable to other creditors. What else could they mean except estoppel, or taking profits as a principal? Profit is generally the great object in forming both the relation of creditor and debtor, and the relation of partners. The question in this class of cases is, whether the relation between the defendants is that of creditor and debtor, or that of partners, i. e., joint principals and mutual agents. If a defendant takes a profit as a creditor, he is a creditor; if he takes it as a principal, he is a principal. It is natural to inquire in which capacity he takes it, because it is the object of the business; he takes it in one capacity or the other, and usually the one in which he takes it is plainly pointed out by the circumstances of the case.

Wilkinson v. Frasier, 4 Esp. 182 (1802), was assumpsit, brought against the captain of a whale ship, by a sailor, to recover his share of the produce of a whaling voyage. By the articles, the proceeds of the voyage were to be divided in certain proportions between the owners of the ship, the officers, and crew. The proportion of a common sailor was a one hundred and ninetieth part. At the trial, the defendant objected that the action could not be maintained, because the plaintiff and defendant were to be paid out of the

Eastman v. Clark.

profits of the voyage, and were therefore partners. But Lord ALVANLEY said, he would not nonsuit the plaintiff on such an objection: that the plaintiff and the other sailors were hired by the defendant and the owners, to serve on board the ship for wages to be paid to him; and the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place: and that he should not, therefore, consider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage." There was a verdict for the defendant. This case only shows there was no partnership *inter sese*: but all the authorities agree that, in such a case, the sailors are not partners as to third persons, and are not liable for the implements they use or the food they consume. *Mair v. Glennie*, 4 M. & S. 240, 244; *Rice v. Austin*, 17 Mass. 197, 206; Parsons on Part. 81, *u*. They do substantially the whole work of the voyage; they, and the officers and owners of the ship, are to have shares ("casual, indefinite, and depending on the accidents of" the business) of the profits of their labor and capital invested in what is, in a certain sense, a common enterprise and joint concern: yet the sailors are not partners *inter sese* or *quoad alios*, because they neither share in the profits, nor have any thing, nor do any thing in the business of the voyage as principals. They are to have shares of the profits as creditors, not as partners.

Hesketh v. Blanchard, 4 East, 144 (1803), was assumpsit for money paid. The plaintiff had brought goods on the credit of himself and the defendant's testator (Robertson), to be disposed of by Robertson, the profit to be equally divided between them. The plaintiff brought this action to recover what he had paid for the goods. A verdict was taken for the plaintiff by consent, subject to the opinion of the court. The objection, that the action could not be maintained because the plaintiff was a partner with the defendant's testator, was overruled. "Lord ELLENBOROUGH, C. J. The distinction, taken in *Waugh v. Carver and others*, applies in this case. *Quoad* third persons it was a partnership; for the plaintiff was to share half the profits. But as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending Robertson his credit." The remark about partnership *quoad* third persons is a *dictum*. The decision is, that the plaintiff was to have a share of the profit, "as a compensation," in the capacity of a creditor, not in the capacity

of a partner. It would seem that the capacity in which he was to have a share depended on the understanding of the plaintiff and Robertson, and that their understanding was a question of fact for the jury. The *dictum*, if correctly reported, and taken literally, is, that ELLENBOROUGH, glancing at *Waugh v. Carter*, inconsiderately took it for granted that *BYRN* meant that every creditor, properly taking a part of the fund on which all creditors rely, becomes thereby liable, as a partner, to all the other creditors: in other words (as this liability must arise from the creditor's right to rely on and take a part of that fund, and not from his taking a part of it), *inter sese*, every partnership firm consists of all the actual partners, but *quoad* the creditors of the firm, it consists of all those actual partners and all those creditors turned into constructive partners by a fiction of law. If the *dictum* is to be taken not literally, but as meaning that "the plaintiff was to share half the profits" as a principal, it is unobjectionable. If it is a loose generality, too vague for practical use, it need not be considered.

Dry v. Boswell, 1 Camp. 329 (1808), throws a light upon the meaning of ELLENBOROUGH in *Hesketh v. Blanchard*. It was "Assumpsit for work and labor, and materials in and about the repairs of a lighter. Plea, the general issue. There was no doubt as to the repairs being done; and the only question was, whether the defendant was liable for them. The witnesses first stated that the lighter was the sole property of a person of the name of Russell, that she was let out by him to the defendant, who worked her; and that the two shared her *profits* equally between them. Lord ELLENBOROUGH said, in that case the defendant was to be considered a partner, and was jointly liable for the repairs done to the lighter: there was here a participation of profit and loss, which constituted a partnership. But the agreement with Russell subsequently appeared to be this, that the defendant, in consideration of working the lighter, should receive half her *gross earnings*, and that Russell, as owner, should receive the other half. Lord ELLENBOROUGH observed that this was only a mode of paying the defendant wages for his labor, and was different from a participation of profit and loss; so that, under these circumstances, no partnership could be considered as existing between him and the owner of the lighter." When it appeared that the defendant was entitled to a share of net profits, a fund which a creditor, as such, cannot be entitled to a share of, and cannot rely upon, ELLENBOROUGH held

Eastman v. Clark.

him to be a partner: when it appeared that he was entitled to a share of gross earnings, a fund which a creditor, as such, may be entitled to a share of, and may rely upon, ELLENBOROUGH held him to be a creditor and not a partner. This was a repudiation of the theory of deriving partnership liability from taking a part of the fund on which creditors rely. The defendant must have been either a creditor or a partner. If he had been entitled to a share of the net profits, the meaning and existence of that fund imply that all creditors have been paid, and that any person entitled to a part of it must be a partner. Lord ELLENBOROUGH probably did not have this view distinctly and fully in his mind; but when he held that the defendant receiving half the gross earnings, received them as "wages for his labor," *i. e.*, received them in the capacity of a creditor, he clearly presented the distinction between a creditor and a partner (which distinction is necessarily the test of liability in such cases), although he took the place of the jury in deciding a question of fact. Whether the defendant was to receive half the gross earnings in the capacity of creditor or joint principal, depended on the understanding of the defendant and Russell; and that understanding was a question of fact.

Wish v. Small, 1 Camp. 331 (1808), exhibits the distinction between a partner's and a creditor's share of profits; but the understanding of the parties on that point appears to have been inferred from the evidence by the judge, and not left to the jury as it should have been.

Ex parte Garland, 10 Ves. 110 (1804), a bankruptcy case, was a petition by the assignees of Margaret Bellman, a widow, whose husband had by will directed her, as executor and trustee, to continue to carry on his business, the profits to be applied for her own use and the maintenance and education of his children. The widow, continuing the business, became a bankrupt; and this petition was for an order declaring the whole of the personal estate liable to the debts contracted by her in carrying on the trades of a miller and farmer under the directions of the will. Lord ELDON refused to make the order.

Barton v. Hanson, Tibbs and ano., 2 Taunt. 49 (1809), was an action brought to recover the price of some hay and corn. The defendants were generally concerned as proprietors of a stage coach running from Hastings to London. They divided the road between themselves into different quarters; and the separate proprietors

Eastman v. Clark.

were severally the owners of the horses which drew the coach through their respective districts, and of the harness; and severally provided their stabling, food and horse-keepers in those districts. The defendants, Hanson and Tibbs, were the proprietors of the horses which drew the coach in the Lamberhurst quarter. * *

None of the other partners had any property in these horses, or contributed to furnish them with corn or hay. The goods in question were delivered for the use of these horses "at a stable owned by the plaintiff and occupied by Hanson. "The profits arising from the coach were divided among the defendants in proportion to the number of miles which they respectively drew it. BEST, Serjt., for the defendants, contended, on the authorities of *Saville v. Robertson*, 4 T. R. 720, and *Coope v. Eyre*, 1 H. Bl. 37, that the defendants were not all jointly liable, and that the plaintiff, therefore, must be nonsuited; but the judge (MACDONALD, C. B.) left it to the jury to decide whether the plaintiff gave credit to Hanson and Tibbs only, or to the whole concern, for that the particular arrangement made between the partners might not be notorious to all the world; and since all the parties proportionably shared the general profits of the business, all might be liable to pay for the goods furnished for the purpose of producing that profit; and it was more probable that the plaintiff should be willing to give credit to the whole concern than to a particular individual." The jury found a verdict for the plaintiff. On the defendants' motion for a new trial, the plaintiff argued that this mode of subdividing the work of a coach on a long road was very common; that the entire partnership, which has the benefit of goods bought under such circumstances, upon every adjustment of the partnership account, pays for them as part of their general outgoings. And this he suggested was the mode of conducting the business between the partners. But the Court of Common Pleas, MANSFIELD, HEATH (who delivered an opinion in *Coope v. Eyre*, and in *Benjamin v. Porteus*, and concurred with EYRE in *Waugh v. Carver*), LAWRENCE and CHAMBRE, "without hearing BEST, were clear that the evidence, as stated, left no ground for this supposition," and set aside the verdict.

This case, as reported, is a strong authority against a sharing-profit test. The remark of the chief baron, at the trial, that, as all the defendants shared the general profits, "all might be liable to pay for the goods furnished for the purpose of producing that

Eastman v. Clark.

profit," in view of the authorities already examined, seems to present the idea that all the defendants were liable if they shared the profits of the entire stage line, from Hastings to London, as joint principals; otherwise not. The case seems distinctly to show that, in 1809, *Waugh v. Carver* was not understood by the eminent counsel, nor by the judges, who might be supposed to understand the reported decisions of their own court, to establish a sharing-profit test. At the trial of *Waland v. Elkins*, 1 Stark. 272, before GIBBS, C. J., in 1816, "BEST, Serjt., referred to the case of *Barton v. Hanson*, 2 Taunt. 49, in which it had been held that for corn supplied for the use of the horses of a stage-coach belonging to several proprietors, but horsed severally for specific stages, that proprietor alone was liable who supplied the horses by which the corn had been used." But GIBBS, C. J., said; "I recollect the case very well, but the decision there turned upon the inferior contract (if I may so term it) between the parties. In that case there was a particular contract between the parties, and it was known in what situation they stood with respect to each other. Such contracts are binding upon the parties, but they make no difference in their relation to the public." From what is said in another report of *Waland v. Elkins*, Holt's N. P. 227, it seems that GIBBS held the defendant to be a partner with one Dyson *inter sese*; and perhaps he understood the defendants in *Barton v. Hanson* were partners *inter sese*, and therefore partners *quoad alios*, except so far as others were aware of their agreement that each should feed his own horses at his own expense. In the statement of the facts and the charge of the judge, in *Barton v. Hanson*, the defendants are spoken of as "partners," as if, in some sense or other, definite or indefinite, they were understood to be partners; but the report does not show that it was an admitted or proved fact that the plaintiff knew that the defendants severally fed their own horses, not at their joint expense. It was held, there was no evidence of their feeding them at their joint expense. At the trial the judge observed "that the particular arrangement (meaning apparently the arrangement for severally and not jointly feeding the horses) made between the partners might not be notorious to all the world;" and for that reason he "left it to the jury to decide whether the plaintiff gave credit to Hanson and Tibbs only, or to the whole concern," giving the jury his opinion that it was more probable that the plaintiff gave credit "to the whole concern," than to Hanson and Tibbs

partner," is a description of a partner. His "specific interest in the profits" is the same as DE GREY'S "specific lien upon the profits." "Profits themselves, as profits," of course are meant to be contrasted with profits, not as profits, but as something else. What else can they be (when somebody is entitled to them not as profits) but profits as a reward of labor, as compensation for any thing as the payment of a debt, as the satisfaction of the claim of a creditor, as the performance of a contract not of the partnership class, or as damages recoverable in an action of law? The case of an heir or legatee, entitled to a share of profits, does not impair the distinction between a partner's right to profits as his profits, and a creditor's right to his debtor's profits as payment of a debt. "Profits as profits," and "profits not as profits," are expressions fully justified by the analogies of the law. The question may arise whether provisions furnished to a pauper by an overseer of the poor were furnished by the overseer as overseer, or as a private individual. It may be disputed whether some one used a highway as a highway, or as a pasture, lumberyard, or play-ground. "It is the duty of towns to keep their highways in suitable repair only for the travel passing thereon, and it is only to the traveler, as such, that the duty can be said to be owing." The statute gives "the traveler, as such," "a remedy only for such injuries as may happen in the use of the highway, as such." *Ball v. Winchester*, 32 N. H. 435, 444. A person who is a common carrier may also be a warehouseman or depositary; and to speak of a common carrier having goods in his possession, under some circumstances, as a common carrier, and being liable as such, and under other circumstances, having the same goods in his possession as a depositary and be liable as such, is to use ordinary language. In Lord ELDON'S mind, the distinction which he accepted as established by authority was involved in some degree of vagueness and obscurity that prevented his appreciating its full force; for he characterized it as "thin," which he would not have done had he clearly seen that it was the distinction between a creditor and a partner. He seems not to have fully realized its breadth; but he recognized it as "settled" by decided cases. If he referred to reported cases, we know what they are; if he referred to unreported ones, they corroborate those that are reported.

It was natural for a chancellor to refer to a bill in equity for an account of profits as one of the rights of a partner. But as such

Eastman v. Clark.

a bill may be maintained by persons not partners, and not liable as partners, it is not a test of partnership liability. "In cases where there is a remedy at law, there is no small confusion and difficulty in the authorities" as to equity jurisdiction of account. There are English authorities which assert that it exists where discovery is material, necessary and effectual. But "there are other authorities in the English courts which conflict with this doctrine, and which, without attempting to lay down any rule for a practical discrimination as to cases within and cases without the jurisdiction, seem to deliver over the subject to interminable doubts. The doctrine now generally (perhaps not universally) held in America is that, in all cases where a court of equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief." 1 Story's Eq., §§ 455, 456. Where a salary is payable to a servant in proportion to the profits of his employer, the question, whether the servant has a right to go into equity for an account and payment, in lieu of suing at law, depends upon whether the accounts are of a too complicated nature to be gone into by a jury. *Harrington v. Churchward*, 6 Jurist (N. S.), 576. If an explanation of the right to a share of "profits as profits" is needed, it is not to be found in any such exquisite uncertainty as "a right to an account." A degree of complication of accounts, too great, as a matter of fact, in the opinion of a court of equity, in each particular case, to be conveniently or satisfactorily disentangled by a jury, would be a novel legal test of partnership liability. If any attempt has ever been made to hold a man's creditors liable to each other for his debts on any theory of that kind, it is not generally known. The right of a partner to an account is a part of ELDON'S description of a partner; but a right to an account is not a test of partnership liability to be given to a jury as a rule of law. If it were given to them, what luck would they have in understanding and applying it?

In *Wightman v. Townroe*, 1 M. & S. 412 (1813), executors improperly continued to carry on the partnership business of the testator for the benefit of his infant daughter. The legal title was in them. They bore profit and loss for the infant, not for themselves. The infant could not be a principal. They were the principals personally liable for the debts. In *Meyer v. Sharpe*, 5 Taunt. 71 (1818), the court, from certain circumstances, drew the inference

or fact that the intention of certain persons interested in an adventure, and sharing the profits of it, was, that they were not partners.

Waland v. Elkins, 1 Stark. 372; S. C., Holt's N. P. 227 (1816), was an action on the case against the defendant, the proprietor of a wagon, for the negligence of his servant, the driver, who had driven the wagon against a cart which stood in a public street, and had forced the cart against the plaintiff's shop window, which was thereby broken. The defendant and one Dyson were carriers from London to Gosport. The defendant provided the wagon. Dyson found horses and drivers from London to Farnham; the defendant found horses and drivers from Farnham to Gosport. When the plaintiff's window was broken, the wagon was drawn by Dyson's horses driven by Dyson's servant, who was hired and paid by Dyson, and with whose employment the defendant had no concern whatever. At the trial, GIBBS, C. J., is reported to have said: "The action is maintainable on this principle: the wagon belongs to Elkins; he has the profit of the carriage. On what terms he engages with other persons to horse the wagon, we cannot tell. It is sufficient that he is found to be a partner in a common concern, and jointly interested with Dyson in the profits. It is of no importance how Elkins and Dyson apportion the carrying business between them. The servant is engaged to drive the wagon for Elkins, as well as for his immediate employer, Dyson. Though by the subordinate contract between the partners he is the servant of one, yet, in the contemplation of the law, and for all purposes of legal responsibility, he is in the employ of both." The report does not show that the question of partnership was passed upon in this *nisi prius* ruling. The judge seems to have taken it for granted that the defendant evidently was, in some sense or other, "a partner in a common concern, and jointly interested with Dyson in the profits," and to have held that consequently Dyson's servant was driving the wagon for the defendant as well as for Dyson. It is not improbable that the doctrine of the overruled case of *Bush v. Steinman*, 1 B. & P. 404 (*Wright v. Holbrook*, 52 N. H. 120) had an influence in promoting a loose notion that the relation of principal and agent existed between the defendant and Dyson's servant, because Dyson's servant was, in a certain sense, driving for the defendant's benefit. The doctrine of holding a man liable as a partner, who takes a share of profits, if it is recognized

by the authorities, stands on the ground that he takes a part of that fund on which creditors rely for payment when they give credit. Did Waland's reliance on the profits cause his window to be broken by Dyson's careless servant?

Cheap v. Cramond, 4 B. & Ald. 668 (1821), was decided upon the authority of *Waugh v. Carver*. ABBOTT, C. J., delivering the opinion of the court, said the principle of the decision in *Waugh v. Carver* was, "that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners *inter se*. By the effect of such an agreement, each house receives from the other a part of that fund on which the creditors of the other rely for payment of their demands, according to the language of Lord Chief Justice DE GREY in the case of *Grace v. Smith*, 2 Sir W. Black. 998. And such an agreement is perfectly distinct from the cases put in the argument before us, of remuneration made to a traveler, or other clerk or agent, by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion." And he mentioned other instances where, as a matter of fact, the relation of creditor and debtor, and not the relation of partners, would be inferred. The decision practically amounts to this: "*Waugh v. Carver* is conclusive authority; it establishes the principle that persons sharing profits are partners, except in those cases in which they are creditors; whether they are creditors or partners, the court, invading the providence of the jury, decide as a question of fact upon the evidence in each particular case." The publication of such decisions tends to confusion, because, while they lay down no legal rule, they are not announced and reported as decisions of questions of fact.

In *Fromont v. Coupland*, 2 Bing. 170 (1824), there was no controversy about the plaintiff's claim. The only question was, whether the defendant could set off against it his own claim against the plaintiff. The plaintiff and defendant had "been engaged in running a coach from Bath to London, the plaintiff finding horses for one part of the road, and the defendant for another, and the profits of each party were calculated according to the number of miles covered by his own horses. The plaintiff received the fares, and rendered an account thereof to the defendant every week. Upon

this weekly account there was a balance due to the defendant of 256l. It did not appear, however, that any final account had been stated, or that the plaintiff had made any promise to pay the balance" which the defendant set up as a claim to be allowed as a set-off. It was held that this claim could not be allowed. The defendant argued that the set-off ought to be allowed: first, because the parties were not partners (citing *Barton v. Hanson*, 2 Taunt. 49); secondly, even supposing them to have been partners, there was an adjustment of the account, upon which either partner might have sued the other, even though there had been no special promise to pay. The first question was, whether the parties were partners *inter sese*. On that question, BEST, C. J., says: "According to the case of *Barton v. Hanson*, these parties are partners, though no authority was requisite to prove that, because both are engaged in carrying the same passengers; they divide the profits, and are answerable to the public jointly." Counsel cite *Barton v. Hanson*, volume and page, as such an authority as the report of that case shows it to be. BEST (who was counsel in that case) is reported as citing it in support of the contrary doctrine, without suggesting that it was erroneously reported. In *Waland v. Elkins*, 1 Stark. 272, BEST, as counsel, relied on the report of *Barton v. Hanson*; and GIBBS, C. J., who said he recollected the case very well, suggested, not that the report was the opposite of the decision, but that the ground of the decision was the (unreported) fact that it was known that the parties severally fed their own horses. If the decision was one way and the report the other, the court in which the decision was made could hardly have avoided explaining the mistake, when the report was relied upon in argument. BEST is of opinion that no authority is requisite to prove that the parties are partners, "because both are engaged in carrying the same passengers; they divide the profits and are answerable to the public jointly. In such a case as *Fromont v. Coupland*, the parties might conduct their business in such a joint manner as to satisfy a jury that they were in fact joint principals and mutual agents in that business, or that they held themselves out as such, and were estopped, as against a third person, to deny the actual existence of the apparent partnership relation which had obtained credit from that third person. BEST draws an inference of fact which a jury might draw. He infers the relation of partners, "because both are engaged in carrying the same passengers." Why name such a

Eastman v. Clark.

fact as a reason for his opinion, if he is laying down sharing profits as a legal test? In other cases, as well as in this, when sharing profits is relied upon, it is coupled, as an item of evidence, with other circumstances, the whole being competent evidence on the question of partnership as a question of fact.

In *Smith v. Watson*, 2 B. & C. 401 (1824), one question was, whether Gill, who was to have share of profits, was a partner with Sampson, *inter sese*, in regard to certain property. Among the remarks of Mr. Justice BAYLEY are the following: "It is said that the jury ought, upon the evidence, to have found that Gill was a partner in this property; I think, however, that the inference is the other way. All the witnesses speak of Gill as a broker, who was to be paid for his trouble in a particular way, viz., by a share of the profits. Now, a right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner, in respect to transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure." HOLROYD, J. (holding, with BAYLEY, J., that sharing profits did not make Gill a partner in the ownership of the property, because it would be contrary to the intention of the parties to construe an agreement for sharing profits to have the effect of conveying an interest in the property itself), said, "It may, indeed, by a general rule of law, founded upon reasons of policy, render him liable, as a partner, to third persons." BEST, J., said, "I am clearly of opinion that Gill had not any joint interest in this property. The question is, not whether he is liable to third persons as a partner, but whether he had such joint interest. There are many cases where a person may be liable to third persons as a partner, and not have any interest in the property. Thus, a person who retires from a house of trade, and suffers his name to continue in the firm after he has ceased to be an actual partner, is liable to the world as a partner, although the property belongs entirely to other persons. * * All the evidence shows that Gill was to act merely as a broker, and not to appear as a partner; he, therefore, would not be liable to the engagements entered into in the course of the transaction." There may be some doubt whether the *dictum* of BAYLEY, repeated by HOLROYD, that sharing profits may render a person who is not a partner liable as a partner, meant that profits may be shared in

such a manner as to call for the application of the general rule of estoppel illustrated by *BEST* in the same connection ; or whether it referred to *Grace v. Smith*, *Waugh v. Carver*, and taking a part of that fund on which creditors rely ; or whether it was an impalpable generality. But there is no doubt that *dicta* of that kind have done much to propagate an uncertain, loose, and visionary notion of a sharing-profits test of partnership liability.

In *Dickinson v. Valpy*, 10 B. & C. 128 (1829), there was a partnership called the Cornwall and Devonshire Mining Company, organized with directors, treasurer, and secretary, and with shares of stock, like a corporation. The action was brought to hold the defendant as a partner by the plaintiff, as indorsee of a bill of exchange drawn by the company on itself. The defendant had applied to the secretary for thirty shares, and ten were appropriated to him. Upon these shares he paid an installment of 5% per share, and received scrip receipts. He afterward paid a second installment of 10% per share, signed a deed, and attended a meeting of the shareholders. At the trial before BURROUGH, J., the defendant objected, first, that there was no evidence to show that the defendant ever actually became a partner in interest, or held himself out to the world as a partner; secondly, assuming that he was proved to be a partner, there was no proof that the directors had authority to bind the shareholders by drawing or accepting bills. The judge was of opinion that there was sufficient proof to make the defendant liable as a partner: the question of the directors' authority was reserved; a verdict was found for the plaintiff: the verdict was set aside, and a nonsuit ordered by the King's Bench. The principal ground of the decision was, that there was no evidence that the directors or members of mining partnerships in general, or this one in particular, were authorized, either expressly or by implication from the usage, nature, or necessity of the business, to bind the firm by notes or bills. PARKE, J., expressed his opinion on the question whether there was sufficient evidence to go to the jury that the defendant was a partner, in which he said, "The bill was not drawn or accepted by the defendant himself, and, therefore, the plaintiff was bound to show that the defendant, either expressly or impliedly, authorized the drawing or accepting of the bill of exchange. * * There is no pretense to say that there was any express authority to draw or accept this bill of exchange; and there is no pretense to say that the drawing or accepting of this bill was

Eastman v. Clark.

subsequently ratified by the defendant; and, therefore, the plaintiff proposes to show that there was an implied authority, and that implied authority, it is said, arises from the relation of partner. * * The plaintiff, therefore, must begin by showing that the defendant stood in the situation of complete partner. He says, I can show that; in the first place, because the defendant has represented himself to be so. And if it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that *the plaintiff* knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement. There is, however, no reason in this case to say that the defendant ever held himself out to the world, still less that he held himself out, either directly or indirectly, to the plaintiff, as a partner. Therefore, upon the ground of representation, he is not liable. It is next said that he was bound, because he was, in point of fact, a partner. * * In those cases in which a plaintiff has not been induced by the defendant's representation *to give credit to him*, but seeks to fix him because he has *really authorized* the contract to be made, the plaintiff must show that authority."

This idea of authority as the test of partnership liability (when there is no estoppel, and the person sought to be charged on a contract, did not make it in person), is the idea of the liability of A, on a contract made by B, authorized by A to make it for and in behalf of A, i. e., the liability of a principal on the contract of his agent. In *Beckham v. Drake and ano.*, 9 M. & W. 79, 97, 98 (1841), "Drake was a dormant partner with the other defendants," Knight and Surgey; and the question was, whether he was liable to the plaintiff on a written contract signed by his partners, he not being named in it. PARKE, B., said: "Inasmuch as the defendant Drake has not subscribed this instrument with his own hand, it must be made out that he is a party to it in point of law, and that he authorized Knight and Surgey to sign it on his behalf. I think that is shown by the fact of his being a partner in the trade, and sharing the

Eastman v. Clark.

profits of it. Being a dormant partner, he authorizes the ostensible partners to enter into such contracts as are usually entered into in the course of such a business. Then the question will be whether this contract is of that description. I see no reason to doubt that it is, being a contract fairly and reasonably entered into for the purpose of employing and retaining the workmen necessary to carry on such a concern. * * * There was an implied authority communicated by the defendant to his partners to enter into this agreement. But * * * it is necessary to make out that the partners meant to pursue that authority, and meant to make a contract on behalf of their copartner Drake and themselves, in order to make the partnership liable. That is rather a question of fact than of law; and the facts which are submitted for the consideration of the court, from which to draw that inference, are sufficient, in my opinion, to enable us to come to the conclusion that the contract was for the benefit of the partnership. * * * All those propositions which are necessary in point of law to be proved, in order to render the defendant Drake liable, are made out in the present case; and, judging from the whole evidence taken together, I think Drake was bound, and that the result is that he is liable upon this contract. If the plaintiff entered into the contract in ignorance of Drake being a real partner, the case would be within the same principle of law which applies to the introduction of a principal before unknown, where the party who contracted, upon the supposition that the agent was the principal, is entitled to all the same benefits and rights, and stands precisely in the same situation as he would have been if he had been aware of the real principal. For all questions between partners are no more than illustrations of the same questions as between principal and agent." In *Ernest v. Nicholls*, 6 H. L. Cas. 401, 417 (1857), Lord WENSLEYDALE said: "The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent.

When in 1860, in *Cox v. Hickman*, 8 H. L. Cas. 268; S. C., 9 C. B. (N. S.) 47, 88-102, it was held by CAMPBELL, BROUGHAM, CRANWORTH, WENSLEYDALE and CHELMSFORD, that "The liability of one partner for the acts of his copartner is, in truth, the liability of a principal for the acts of his agent;" that "the law as to partnership is undoubtedly a branch of the law of principal and agent;" that upon the question of agency—the question of the

authority of one person as agent to make a contract binding another as principal — “we must look at the real nature of the transaction, according to the understanding of “the persons alleged to be principal and agent — it was not a new doctrine those venerable jurists declared. WENSLEYDALE, as a new lord, and as Mr. Baron PARKE of the Court of Exchequer, and as Mr. Justice PARKE of the King’s Bench, had been repeating it for more than thirty years, without any suspicion that he was broaching a novelty.

Fox v. Clifton, 6 Bing. 776 (1830), was assumpsit against seven defendants to recover a debt due the plaintiff from the “Imperial Distillery Company,” the plaintiff claiming to hold the defendants as partners. It was tried before TINDAL, C. J., who submitted to the jury three questions: “1st. Whether, when the contract was entered into with the plaintiff, all the defendants were, as partners, entitled to a share of the profits of the concern; 2dly. Whether, if this were an inchoate partnership, the defendants had legally withdrawn themselves from the concern before the partnership was complete; 3dly. Whether, in such case, they had held themselves out as partners.” The first question recognizes a distinction between being entitled to a share of the profits “as partners,” and being entitled to a share not as partners. The jury found a verdict for the plaintiff, which the court set aside on the ground that, under the circumstances proved, the directors had no authority to bind the defendants. TINDAL, C. J., delivering the opinion of the court (after holding there was no evidence of an estoppel) upon the main question whether the defendants were actually partners, said: “The question, therefore, becomes this — whether, at the time of this contract made by the directors, the relation between the defendants and them was such that the directors were constituted the agents of the defendants to bind them by their contracts.” This is the doctrine of *Cox v. Hickman*, stated with a precision that leaves no room for a doubt of the meaning. In the course of the opinion, the Chief Justice says, upon the question “whether a partnership was actually formed, we think, if the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as a test of a partnership, these defendants were not entitled at any time to demand a share of profits, if profits had been made, inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no further than that the defendants had offered to become partners

in a projected concern, and that the concern proved abortive before the period at which the partnership was to commence; and, therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants." While he says the question of liability when there is no estoppel is the question of agency and authority, he also recognizes a sharing-profits test in the form of "the right to participate in the profits of a joint concern," meaning, by "the profits of a joint concern," the net profits of a concern of joint principals.

Upon a second trial of *Fox v. Clifton*, 9 Bing. 115 (1832), the jury again found a verdict for the plaintiff, "notwithstanding the direction of TINDAL, C. J., that the facts proved did not constitute the defendants partners in the concern," nor make out an estoppel. This verdict also the court set aside, on the ground that it was "against the legal result of the facts proved," and a new trial was granted. TINDAL, C. J., again delivering the opinion of the court, says, "The questions in this case submitted to the jury were not questions of mere fact, but questions in which the law and the fact were so intimately involved and combined together, that the jury cannot be said to have come to a right conclusion upon the fact, unless they are contented to take the law upon the subject from the judge who presides at the trial. Whether particular persons have entered into a partnership together, is, indeed, when abstractedly put, a question of mere fact." He then goes on to distinguish the law from the fact, and the province of the court from the province of the jury in such cases, without giving any explanation, that would be satisfactory in our system of practice, of the action of the court in instructing the jury and granting two new trials, instead of ordering a nonsuit. The explanation and action of the court in that case illustrate the practical confusion of law and fact in English practice, that tends to involve legal tests in a degree of obscurity.

In *Ex parte Chuck*, 8 Bing. 469 (1832), there was an undisclosed partner entitled, not to "any definite aliquot proportion of the profits," but to a certain sum annually "out of the clear profits," "clear profits" being used in the sense of the profits left after paying all creditors.

In *Green v. Beesley*, 2 Bing. N. C. 108 (1835), the declaration was held bad on demurrer, because it alleged a communion of

Eastman v. Clark.

profit and loss between the plaintiff, and the defendant that made them partners. TINDAL, C. J., said, "I have always understood the definition of partnership to be a mutual participation in profit and loss." If by "a communion of profit and loss" is meant a joint ownership of the gross profits left after making up all losses and paying all debts, it is a sufficient proof of the relation of joint principals; but the phrase is often used in a very indefinite sense.

In *Owen v. Body*, 5 A. & E. 28 (1836), it was held that a certain assignment for the benefit of creditors, with a stipulation for the assignees continuing the debtor's business, and appropriating the profits to the payment of such creditors as should sign the assignment, was invalid, because it might be construed to create a partnership among the creditors signing it. Creditors were not bound to accept the assignment with the possibility of the court holding the true construction of it to be that the creditors accepting it would be interested as principals in carrying on the business. *Janes v. Whitbread*, 11 C. B. 406, 417, 418, 419; *Coates v. Williams*, 7 Exch. 205, 206; *Cox v. Hickman*, 18 C. B. 617, 632, 634-638; S. C., 3 C. B. (N. S.) 523, 528, 538, 541, 558, 559; S. C., 9 id. 47, 86, 101.

In *Bond and ano. v. Pittard*, 3 M. & W. 357 (1838), the question being whether the plaintiffs were partners, PATTESON, J., told the jury that to constitute a partnership, there ought to be a community of loss as well as profit. Out of the profits of the joint business of the plaintiffs, one of them was to have 300*l.* annually. The Court of Exchequer held them to be partners, PARKE, B., remarking that the 300*l.* was to come out of the net profits.

Wilson v. Whitehead and ano., 10 M. & W. 503 (1842), was assumpsit for paper sold and delivered; and was an attempt to hold liable, as partners, the defendants who were to share the profits of publishing a review. The Chief Baron, in directing a nonsuit, and the Court of Exchequer (ABINGER, PARKE, GURNEY and ROLFE), in refusing to set it aside, may have taken the place of the jury in drawing an inference of fact. PARKE, B., said the question was one of authority: "Did the other defendants authorize Whitehead to purchase the paper on their account?" This is the doctrine of agency — the doctrine of *Cox v. Hickman*, in the decision of which case, eighteen years afterward, PARKE and ROLFE (as Lords WENSLEYDALE and CRANWORTH) took part.

Pott v. Eyton, 3 C. B. 32 (1846), was assumpsit by the assignees

of bankrupt bankers, brought to hold the defendants, Eyton and Jones, as partners. Jones was defaulted. An agreement had been made between the defendants for opening a shop, principally with a view of supplying goods to the workmen of Eyton's colliery. Eyton built the shop, and his name was placed over the door. Jones sold the goods. Eyton received a certain per cent of the amount of sales to his workmen; and Jones had the rest of the profits. TINDAL, C. J., left it to the jury to say, first, whether there had been a sharing of profit and loss between Eyton and Jones, so as to constitute an actual partnership; secondly, whether Eyton had been, by his own permission, held out as a partner, and his credit pledged to the bank. The jury, answering both questions in the negative, returned a verdict for the defendants; and the court being of opinion that the verdict was right, the plaintiffs' motion for a new trial, on the ground of the verdict being against the evidence, was denied. TINDALL, C. J., delivering the opinion of the court, says, "There was no evidence to show that credit was in fact given to Eyton, or that the bankers knew that his name was over the door of the shop at Mostyn Quay, or that they supposed him to be a partner. * * We must assume, therefore, that credit was given to Jones alone; and if Eyton is to be made liable, that must be on the ground of an *actual* partnership between himself and Jones. It was contended that an actual partnership was proved, for that Eyton, by taking 5l. per cent on the sales to his workmen, received a share of the profits, and was therefore, in point of law, a partner as to third persons. But we are of opinion that the taking of that money was not sufficient to make him a partner. Traders become partners between themselves by a mutual participation of profit and loss; but, as to third persons, they are partners if they share the profits of a concern; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is, therefore, to be made liable to losses, although he may have expressly stipulated for exemption from them. *Grace v. Smith*, 2 W. Bl. 998; *Waugh v. Carver*, 2 H. Bl. 235." He quotes DEGREY's "true criterion," "to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment;" says this distinction has been recognized in many cases, of which it may suffice to mention *Dry v. Boswell*, 1 Camp. 329, *Benjamin v. Porteus*, 2 H. Bl. 590; *Ex parti*

Hamper, 17 Ves. 404; and *Ex parte Watson*, 19 Ves. 459, and concludes thus: "It appears to us that, in the present case, the payment to Kyton was in the nature of commission on certain sales supposed to be effected through his influence over the workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner; and in so far as it was a question of fact, it was disposed of by the jury." This decision is a strong authority to the point that, when there is no estoppel, if a man is made liable to third persons, as a partner, it "must be on the ground of an actual partnership" *inter sese*. The court seem to have been confused, as others have been, by the specious, superficial, and unmeaning generality of *Grace v. Smith* and *Waugh v. Carver*, about taking a part of the profits, and creditors relying on the profits; but the decision is flatly opposed to the creation of a liability to third persons for taking a part of "the profits," in an undefined, indiscriminating, and unlimited sense, when there is no estoppel, and no actual partnership *inter sese*.

The remark of PARKE, B., in *McAlpine v. Mangnall*, 3 C. B. 496, 516 (1846), that creditors, for whose benefit a debtor's assignment is made and his business continued, are not responsible as partners to persons furnishing goods for carrying on the business, may be questionable. It does not recognize a sharing-profits test of liability; but whether creditors, who become parties in such an arrangement, are joint principals in the business carried on, with their assent, for their benefit, whether it is their business, conducted by their agents authorized to make necessary contracts, binding them as principals, is a question that is not disposed of by rejecting a sharing-profits test.

Barry and ano. v. Nesham and Lowthin, 3 C. B. 641 (1846), was assumpsit to recover for goods alleged to have been sold to the defendants as partners in the publication of a newspaper. Lowthin was defaulted. A verdict was taken for the plaintiffs, subject to the opinion of the court upon the evidence; if the court should be of opinion that the plaintiffs were entitled to maintain the action, the verdict was to stand; otherwise, to be entered for the defendant Nesham. In cases brought up for decision in this manner, in the English practice, the court frequently pass upon the weight of the evidence, much as if the case were tried by the court without a jury, and the distinction between law and fact is not observed; and if the court infer partnership from sharing profits, the question

Eastman v. Clark.

remains whether the inference is one of law or fact. The plaintiffs argued that the real question was, whether Nesham was entitled to a part of the fund on which creditors relied for the payment of their debts (citing to that point, *Grace v. Smith* and *Waugh v. Carver*), and claimed that "this court, in the recent case of *Pott v. Eyton*, 3 O. B. 32, distinctly recognized the principle, that one who takes a share of the *profits*, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which creditors have a right to rely for payment." For the defendant, it was argued that he did "not stipulate for any part of the profits, as such." The court (WILDE, COLTMAN, MAULE and WILLIAMS) were of opinion that Nesham was liable as a partner. WILDE, C. J., said, "Looking at the intention of the parties to this agreement, I am unable to come to any other conclusion than that it created an interest in the profits of the concern in Nesham, which constituted him a partner, *quoad* third persons. * * All the cases seem to agree that, whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons; for it is but reasonable that one who stipulates for an interest in the profits should be held liable to those who supply the means of carrying on the trading concern out of which those profits are to arise. It is, therefore, material to ascertain what was the interest which Nesham created for himself by this agreement. He was to receive all the profits acquired by the publication of the newspaper, beyond 150*l.* *per annum*, until the 1,500*l.* and interest and 500*l.* in addition should have been fully paid. If no profits were realized beyond 150*l.* *per annum*, he would get nothing. * * Throughout each year of the term, Nesham's right to receive any thing depends upon the contingency of a fund accruing from profits. * * It seems to me, therefore, upon the simplest principles applicable to the law of partnership, that Nesham has entered into the contract under circumstances that impose upon him a liability for goods supplied for the carrying on of the concern. It would be most unjust and unreasonable that he should be permitted to take the whole profits of the publication, and not be held responsible for the debts." COLTMAN, J., said, "A party who stipulates for a participation of the profits, as such, is liable as a partner, *quoad* third persons, notwithstanding he may have expressly stipulated that he shall not be subject to losses." MAULE,

Eastman v. Clark.

J., said, "I quite agree that we are to look at the substance, and not at the mere form, of the transaction. The question is, whether it gave Nesham an interest in the profits of the newspaper. Before the date of the agreement, the whole profits belonged to him. What does he, in substance, part with? Lowthin is to manage the concern, and to receive 150*l.* a year, at all events, for seven years. That is all that Lowthin is certain of receiving. Deduct that sum from the whole interest in the newspaper, and Nesham is interested in the excess, except in the improbable event of the profits realizing more than sufficient to pay the annual installments of the 1,500*l.*, the 150*l.* a year to Lowthin, and the further sum of 500*l.* in the seven years. Upon that simple statement, it might very well be questioned whether Lowthin was a partner, or whether he was not a sort of a salaried manager, remotely interested in surplus profits. It is, however, unnecessary to discuss that, for no one disputes that *he* is a partner. I think Nesham is a much more unquestionable partner than Lowthin."

In *Heyhoe v. Berge*, 9 C. B. 431 (1850), the question was, whether the defendant was liable as a partner with others, with whom, or from whom, he was to receive a share of the clear profits arising from a contract to construct a piece of railway. At the first trial, POLLOCK, C. B., told the jury that, if they believed the written agreements to be the agreements which they purported to be, "they ought to find that the defendant was interested in the profits, and consequently a partner." "The jury accordingly returned a verdict for the plaintiff," which the court (COLTMAN, MAULE, ORESSWELL and WILLIAMS) set aside. The decision (delivered by COLTMAN, J.) was this: "It appears to the court that there was in this case a question of fact which ought to have been submitted to the jury, viz., whether the defendant had assented to the agreement of the 5th of August, 1846. We think that the omission to present that to the jury, and dealing with the whole as a question of law, was a miscarriage, and, consequently, that the rule should be made absolute for a new trial." At the second trial, Mr. Baron PARKE presided. A part of his charge to the jury occupies seven and a half pages of the report. The jury found a verdict for the plaintiff, which the court refused to set aside. PARKE "left the question to the jury *on the whole of the evidence*, not leaving it that that instrument (the principal written agreement relied on) constituted a partnership; on the contrary, he said

it would not." The reporters say that, in presenting the case to the jury, he told them that the first question for them to consider was, whether there was a partnership between the defendant and Fly and Frost, whether he entered into a contract with them to share in the profit and loss of the particular adventure; that, if the defendant did actually agree, by a binding contract, to take a share of the profits of the adventure, in point of law he was a partner, and authorized every thing that was necessary for the purpose of carrying the contract into effect, and constituted Fly and Frost his agents for the purpose of entering into any sub-contracts which might be necessary for that purpose. The report goes on to give PARKE'S own words. Among the observations appearing to be in his own language are the following: "This agreement purports to give the defendant a fourth part of the clear profits, not the gross profits of the contract." A person who shares *gross* profits is not a partner; but a person who shares *net* profits is *prima facie* to be considered as a partner. * * Upon the whole of the facts, taken together, the question will be, whether you are satisfied that this was a binding agreement, * * that the defendant should have a share of the net profits of carrying into effect this particular contract. If you are not satisfied of that, there is an end of the plaintiff's case, because the whole rests upon the inference to be drawn, of the defendant's being a partner in the profit and loss of the contract. If he is *not* a partner in the profit and loss, then the defendant is entitled to your verdict. But, if you are satisfied that he *was* a partner in the contract, then the defendant is, I think, responsible for all the acts done by Fly and Frost, which were necessary for the purpose of carrying the contract into effect. * *

I am of opinion that the rule of law, as to sharing net profits, is not confined to the general dealings of that nature, but is also applicable to particular transactions; that, if a person agree to share with another, by a binding agreement, the profits of a particular adventure, they are partners in that particular adventure. Sometimes cases arise in which a person, although he is taking a share of the profits, is not a partner for some purposes; such, for instance, is the case of the whale-fisheries; it is well known by persons conversant with that trade, that the master, the mates, and the seamen all take a share in the ultimate profits of the voyage, proportioned to their rate of wages; but that does not constitute them partners, so as to render them liable for articles supplied in the equipment

Eastman v. Clark.

of the vessel; it is only a mode of remunerating them for their services. But, where a person stipulates for a share in the net profits of a concern, and has a right to an account of the net profits as a partner, he is liable, although the partnership is limited to a single transaction or adventure. * * If you are satisfied that there was this contract between Fly and Frost and the defendant, then comes the question whether Fly and Frost were authorized to enter into a contract for the work in respect of which it is now sought to charge the defendant as a partner."

Such are the most important English cases, before *Cox v. Hickman* (1860), relating to the subject of a sharing-profits test. Whatever loose, general notions may have been entertained as to the effect of these cases, they do not establish such a test in an unqualified form. They cannot be arrayed as a mass of authorities overruled by *Cox v. Hickman* and the subsequent cases, which have settled the law, for England, that sharing profits, in a general unlimited sense, is not a test.

Neither is such a test established by a preponderance of the weight of American cases, decided without reference to *Cox v. Hickman*. The subject has been much considered in Massachusetts; and the result is far from being a simple, absolute sharing-profits test. *Reynolds v. Toppan*, 15 Mass. 370; *Rice v. Austin*, 17 id. 197; *Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 id. 234; *Cutler v. Winsor*, 6 id. 335; *Turner v. Bissell*, 14 id. 192; *Denny v. Cabot*, 6 Metc. 82; *Bradley v. White*, 10 id. 303; *Holmes v. O. C. R. R.*, 5 Gray, 58; *Fitch v. Harrington*, 13 id. 468; *Julio v. Ingalls*, 1 Allen, 41; *Gunnison v. Langley*, 3 id. 337; *Pratt v. Langdon*, 12 id. 544; S. C., 97 Mass. 97. Sometimes such a test seems to be recognized with the qualification "as a principal." *Loomis v. Marshall*, 12 Conn. 69; *Berthold v. Goldsmith*, 24 How. 536, 548; Collyer on Part., Book 1, ch. 1, § 25; Story on Part., §§ 49, 54, 55. Of course, if one shares profits "as a principal," i. e., in the capacity of a principal, he is a principal; and so he is if he does any thing else in that capacity.

When sharing profits is accepted as a test, it is almost universally with this qualification, that if the profits are received as compensation for services, or payment of any debt, sharing them is not a test. The number of cases that favor an unqualified sharing-profits test is hardly appreciable among the vast numbers opposed to it. What is said in *Bromley v. Elliot*, 38 N. H. 287, 305,

Eastman v. Clark.

against the compensation or creditor qualification of the test, is against an irresistible weight of authority. *Holmes v. O. C. R. R.*, 5 Gray, 58, 60; *Fitch v. Harrington*, 13 id. 468, 474; *Burckle v. Eckart*, 1 Denio, 337, 341; S. C., 3 Comst. 132, 138; *Heimstreet v. Howland*, 5 Denio, 68, 70; *Perrine v. Hankinson*, 6 Halst. 181; Story on Part., §§ 41-49; Parsons on Part. 85 n; Collyer on Part., Book 1, ch. 1, §§ 25-50; cases cited in notes of Am. ed. of 3 M. & W. 361, and 9 C. B. 458; 1 Smith's Lead. Cas. 805, Hare & W., note. "A person may be allowed, in special cases, to receive part of the profits of a business without becoming a legal or responsible partner. Thus a party may by agreement receive, by way of rent, a portion of the profits of a farm or tavern, without becoming a partner. So, to allow a clerk or agent a portion of the profits of sales as a compensation for labor, or a factor a percentage on the amount of sales, does not render the agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an interest in the profits in the character of profits, and there is no mutuality between the parties. A person in business may employ another as a subordinate, and agree to pay him a share of the profits, if any shall arise, without giving him the rights or liabilities of a partner. So, seamen take a share, by agreement with the ship-owner, in the profits or gross proceeds of a whale-fishery or coasting voyage, by way of compensation for their services; and shipments from this country to India, upon half profits, are usual, and the responsibility of partners has never been supposed to flow from such special agreements. This distinction seems to be definitely established by a series of decisions, and it is not now to be questioned." 3 Kent's Com. 33. Add together all the exceptions recognized by the authorities, and the rule amounts to this: a sharer of profits is a partner in those cases in which he is not a creditor. The original question — creditor or partner? is presented by the test proposed for the solution of that question. "It is," says Judge STORY, "far from being universally true that mere participation in the profits constitutes the party a partner; at most, it is true only *sub modo*." Story on Part., § 36. A sharer of profits is a partner; that is the rule *sub modo*; he is a partner when he is not a creditor. A sharer of profits is a creditor; that is the rule *sub modo*; he is a creditor when he is not a partner.

The sharing-profits test, in this modified form, enveloped in and

Eastman v. Clark.

consolidated with its mass of qualifications and exceptions — the only form in which it can be claimed to be established by the authorities — is nothing but the elementary doctrine of the liability of a principal, disclosed or undisclosed, on an authorized contract made by his agent, which is the doctrine of *Cox v. Hickman*, and the subsequent English cases. *Cox v. Hickman*, Beavan, 164; 25 L. J. Ch. 142; 18 C. B. 617; 3 C. B. (N. S.) 523; 8 H. L. Cas. 268; 9 C. B. (N. S.) 47; *Kilshaw v. Jukes*, 3 B. & S. 847; *Bullen v. Sharp*, 18 C. B. (N. S.) 614; L. R., 1 C. P. 86; *Redpath v. Wigg*, L. R., 1 Ex. 335; *Easterbrook v. Barker*, L. R., 6 C. P. 1; *Holme v. Hammond*, L. R., 7 Ex. 218; *Shaw v. Galt*, 16 Ir. Com. Law, 357; *Re E. & I. C. & U. A. S.*, 1 Hemming & Miller, 85; *Mollwo v. Court of Wards*, L. R., 4 P. C. 419; *Noakes v. Barlow*, 20 W. R. 388; 26 L. T. (N. S.) 136; *Ex parte Macmillan*, *Re Whitaker*, 24 L. T. (N. S.) 143.

In the supposed case of flour trade, where A is to have one-ninth of the profit, if it is net profit that he is to have a share of, he is to have it, not as a creditor, but as an owner; the net profit, in cash, specifically ascertained, identified and deposited by itself, is the joint property of A and B before it is divided; it is the residue of the proceeds of the sales, all those proceeds, as well as that residue, were the joint property of A and B; the flour which produced those proceeds was their property; it was bought and sold by them as joint principals; the title passed from C to A and B, and not to B only; B, in buying it, acted as agent of A as well as for himself; by the contract of purchase, made by B as a joint principal and agent of A, A is bound as a principal. If we begin with net profit, as the result and test, and cite in support of it the cases usually grouped under *Waugh v. Carver*, net profit leads us back to the relation of principal and agent (the doctrine of *Cox v. Hickman*) as the starting point. If we begin with the relation of principal and agent, it leads us forward, over the same course, to net profit as the result. For legal and practical purposes it is one route.

In *Cox v. Hickman* (and in other cases) there was a difference of opinion as to the construction of an assignment of property to trustees for the benefit of creditors, which provided for the continuance of the debtor's business, and the appropriation of the profits to the payment of creditors. The question, who were the principals in the continued business? was rendered difficult by the complicated nature of the assignment. Whether the final decision of that question of

construction was right or wrong is not material in the present case. The same question would have arisen under the sharing-profits test. By the true construction of the assignment, were the profits to be received by the creditor as creditors, or as joint principals and partners in the continued business? The insertion of the word "profits" in the question does not cause the difficulty of the question to vanish.

LORD CRANWORTH said a right to participate in profits, "no doubt, is in general a sufficiently accurate test; for, a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim." *Cox v. Hickman*, 9 C. B. (N. S.) 92. By a "sufficiently accurate test," he meant satisfactory evidence. His remark suggests how easily a piece of evidence could be transformed into a legal test *sub modo*, by tribunals accustomed, as English courts are, to declare their judgment on questions of fact. When LORD CRANWORTH said sharing profits affords cogent evidence of a partnership, he expressed his opinion on a question of fact; and the evident soundness of such an opinion tends to obliterate the distinction between the law and the fact of the subject. Sharing profits, in the absence of all other evidence, would as a matter of fact, be cogent evidence of a partnership; but every item of cogent evidence is not a legal test; moreover, it is generally impossible to have no other evidence in a case than sharing profits; whether it is cogent or weak, depends upon its character, explained by other circumstances; in this jurisdiction, the judge does not give the jury his opinion of the strength of the evidence.

"A partnership, in which the entire profit was to belong to some of them in exclusion of others, would be manifestly unjust; and, as between the parties themselves, it would not be a proper partnership. It would be what the Roman lawyers called *societas leonina*, in allusion to the fable of the lion, who having entered into a partnership with the other animals of the forest, in hunting, appropriated to himself all the prey." 3 Kent's Com. 29; Story on Part., § 18. This is civil-law doctrine; it relates wholly to the force, effect, and validity of partnership *inter sese*, and has no reference to the rights of third persons. If it were a doctrine of the common law, it would go to show that the contract of a *societas leonina* is void *inter sese*, and not that the parties are liable to third

Eastman v. Clark.

persons. But it is not to be admitted, without deliberation, that there is any such doctrine in the common law. "It may be said, says Mr. Baron BRAMWELL, in *Bullen v. Sharp*, L. R., 1 C. P. 126, 127, "that, if this reasoning is right, a man might bargain to receive all the profits of a business, and not be liable. The answer is, the thing is impossible. There never was, and never will be, a *bona fide* agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colorable." Suppose a New Hampshire merchant, having gained a sufficient estate in trade, and desiring to continue his business for the industrial and charitable purpose of supporting a missionary in Ceylon, gives him a bond to pay him all the future profits of his business; and suppose the profits are called "net profits" in the bond; was there ever a court that would hold the missionary liable as a partner for the goods bought by the merchant in carrying on his business? It would be evident that they both understood the missionary to be a creditor and not a partner; that, by "net profits," they meant the surplus of gross profits left after paying all other creditors of the business; and that, in the literal sense, there would be no net profits of the business. Why should the missionary be liable, especially seeing he was not to defraud the other creditors, but only to receive the balance of profits left after they were all paid?

The result of this examination of the authorities is, that the instructions given to the jury, in the present case, were erroneous. There is a provision in the reserved case, that, if there is an error in the instructions as to the effect of a division of the gross receipts, judgment is to be rendered for Stillings. But the mistrial seems to have been such that the verdict ought to be set aside, and a new trial granted.

SARGENT, C. J., FOSTER and LADD, JJ., concurring, a new trial was granted.

FAY V. PARKER.

(88 N. H. 322.)

Damages — exemplary or punitive, in actions for tort.

In a civil action for a tort which may also be punished criminally, punitive or exemplary damages are not recoverable.

In trespass for an assault and battery, the court instructed the jury that if they found for the plaintiff they might, in addition to the compensatory damages, give exemplary or punitive damages. *Held*, error.

Quære whether exemplary or punitive damages are allowable in any civil action.

TRESPASS by Robert Fay and wife against Parker for an assault and battery upon Mrs. Fay.

The court instructed the jury that if they found against the defendant they should assess the actual damages, which would include compensation for all injury to the feelings as well as to the person of Mrs. Fay; that if the assault was accompanied by act or word of indecency, outrage, insult or indignity which injured her feelings, compensation therefor should be included in the actual damages; and that they might give exemplary damages, which would be punitive and not compensatory, if they thought it a case in which an example ought to be made for the protection of the public. To these instructions the defendant excepted.

The jury returned a verdict for the plaintiff, assessing the actual damages at \$150, and the exemplary damages at \$331.61.

Duncan and Blaisdell, for plaintiffs.

C. W. & E. D. Rand and Young, for defendant.

FOSTER, J. A synonym of *damage* (when applied to a person sustaining an injury) is *loss*. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage — in French *dommage*; Latin *damnum*, from *demo*, to take away — signifies the thing taken away — the lost thing, which a party is entitled to have restored to him, so that he may be made *whole* again.

Fay v. Parker.

Damage, we remarked, is derived from *demo*, to take away ; and therefore it is not derived from *punio*, to punish.

When used to signify the money which a plaintiff ought to recover, damage is never, nor in any sense, synonymous with, nor collateral to, the terms example, fine, penalty, punishment, revenge, discipline, or chastisement.

Loss or damage sustained — the thing taken away — may be supplied by compensation ; but the loss, damage, or thing taken away, cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage.

It is just as easy to call things by their right names as by wrong names, and it is better to be correct than careless in our speech.

The defendant's exception presents the question whether punitive damages (so called, by a perversion of language and ideas so ancient and so common as seldom to attract^a attention), that is to say, damages in the nature of, and intended as, a penalty of punishment, and exemplary damages, that is to say (if the people will persist in saying it), damages in the nature of, and intended as, an example for the protection of the public against offenses similar to that for which such damages are awarded (inflicted), may be given to the plaintiff in a civil action resulting from an act for which the defendant may be indicted and punished by force of the criminal law.

In considering this question, we must regard the terms exemplary, vindictive, and punitive or punitory, as meaning the same thing ; such being, doubtless, the acceptation of the language of the courts generally in cases where these terms are employed with reference to damages in a civil action.

In so far as the settlement of this question depends upon the weight of authority, it will be appropriate and convenient to direct our attention, in the first place, to those decisions of the courts of this State wherein the subject of exemplary, vindictive, or punitive damages has been considered. The most prominent cases of this character are twenty in number. We will refer to them in chronological order.

Sanborn v. Neilson, 4 N. H. 501, A. D. 1828. This was an action for criminal conversation with the plaintiff's wife, an offense, then punishable by fine, imprisonment, and whipping, not exceeding thirty stripes. Act of Feb. 15, 1791.

Upon the trial, the jury were instructed that "if they found for

the plaintiff (her cousin and master, *in loco parentis*) 'or his wounded and mortified feelings occasioned by the act, and such as would *tend to check* the commission of such offenses.

In delivering the judgment of the court, GILCHRIST, J., remarks that he is unable to see any sufficient objection to the directions; and adds: "It is hardly necessary to say that exemplary damages may be given in this action, since such damages are the end for which it is ordinarily brought." He refers to the anomalous character of the principle regulating the damages in suits of this character, by which courts and juries have undertaken to render substantial justice, without precise conformity to any clearly scientific rule.

We cannot fail to observe that while the learned judge applies the term "exemplary" to the damages which such a case allows, it is in reality used as indicating those damages which the betrayed victim sustains in her feelings and for her disgrace; that all the elements of damage are such as come clearly within the boundaries limiting compensatory damages, though "*tending*," indirectly, "to check the commission of such offenses."

Whitney v. Swett, 22 N. H. 10, A. D. 1850, was trespass *quare clausum*, in which circumstances of abuse of authority, such as to constitute the acts of the defendants, after a lawful entry upon the land, a trespass *ab initio*, and where the question of exemplary damages might well have been raised — but it was not suggested — the instruction to the jury, approved by BELL, J., in the opinion of the court, being that the jury should "take the whole case into consideration, and award to the plaintiff such sum in damages as, under the circumstances, they thought the defendant ought to pay and the plaintiff ought to receive."

The collocation of words here seems to us to indicate that the court intended to say that what the defendant ought to pay was *that which* the plaintiff ought to receive; and that the transposition of the two terms of this same proposition, in *Sanborn v. Neilson*, before cited, does not vary the sense and meaning in that case.

Symonds v. Carter, 32 N. H. 458, A. D. 1855, was slander. Words other than those laid in the declaration were admitted as evidence of express malice. FOWLER, J., among other cases in support of the precise point raised by the exception to this evidence, cites *Kinney v. Hosea*, 3 Harr. 397, to this proposition — "if there be evidence of express malice, the jury may give exemplary damages"

Fay v. Parker.

—the only instance of the use of that term “exemplary” in the lengthy opinion of the court, or in any of the cases referred to. The damages thus designated are clearly of the same character as those regarded as compensatory merely, in *Merrill v. Peaslee*, before cited, and other cases of the same character. They are precisely such damages as are comprehended within the rules laid down in 2 Greenl. Ev. §§ 266, 272, and which go in aggravation of the injury itself, which the complaining party has sustained in his feelings by the manifestation of the malice of his adversary.

Severance v. Healey, 32 N. H. 289, A. D. 1855. Slander. The case is precisely like the preceding case of *Symonds v. Carter*. Without alluding in any manner to the question of exemplary damages, evidence of the speaking of other slanders than those laid in the declaration was held admissible as showing malice, and (said the court) the plaintiff was entitled to the benefit of it. The case discloses evidence of such deep malignity, and such circumstances of insult and indignity, as would seem to call loudly for an award of punitive damages, if such were admissible in any case of slander; but with Judge PERLEY, Judge BARTLETT and JAMES BELL, then of counsel, such a claim was not suggested.

Hopkins v. The Railroad, 36 N. H. 9, A. D. 1857, is clear to the point that the jury may give exemplary damages where a personal injury has been caused by the gross carelessness of a railroad in the management of its trains.

The question as to the liability of a defendant to pay punitive damages, beyond a compensation, was not raised in the case (the question being whether it could be applied to a corporation in the case of the negligence merely of their servants), such a rule being conceded by the defendant's counsel as applicable to cases where the tort is aggravated by fraud, malice, violence, cruelty, or the like circumstances. The court assent to the rule thus admitted in the argument, “regarding it as extremely well settled that exemplary or vindictive damages may, in certain cases, be recovered; and this (the opinion goes on to say) is perhaps in accordance with the legislative policy, which has given pecuniary penalties, in numerous instances, to private prosecutors of certain offenses. Where the wrong done to the party partakes of a criminal character, though not punishable as an offense against the State, the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice on a civil suit; and exemplary dam-

ages may in such cases encourage prosecutions, where a mere compensation for the private injury would not repay the trouble and expense of the proceeding.

"It is objected that in this case exemplary damages cannot be recovered because the foundation of the action is negligence, and not a willful and malicious act of the defendants. Such damages are awarded for the sake of the public example, or to punish some act or default which has more or less the character of a crime." "Gross carelessness, where duty to the public requires the utmost care, * * * has certainly a strong character of cruelty and moral turpitude."

The *dictum* of this case may well be regarded as expressing the opinion of the distinguished jurist who announced it, in favor of the abstract principle which would allow damages beyond compensation in cases of much aggravation.

But, waiving for the present the consideration of that general and abstract proposition, it need hardly be observed that the case is not an authority for the plaintiffs here—that being a case, as this is not, where the interests of society could derive no protection from the arm of the criminal law.

It suggests this *quære*: How would it be if the law provided a punishment by indictment and fine for the same act of negligence in all cases, as in the special case provided for by Gen. Stats., ch. 264, § 14?

In this case Judge PERLEY suggests that one reason why exemplary damages should be allowed is, because the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice on a civil suit; and exemplary damages may in such cases encourage prosecutions, where a mere compensation for the private injury would not repay the trouble and expense of the proceeding. But, with submission, we remark, that wherever the public interest seems to require the private prosecution of offenses against good morals, a sufficient stimulus is afforded by those salutary provisions which give to the prosecutor, as in *qui tam* actions, for instance, a part or all of the penalty which the wrong-doer has incurred.

Knight v. Foster, 39 N. H. 576, A. D. 1859. Slander. Cushing, for the defendant, *arguendo*, says: "The doctrine in regard to vindictive damages seems to be now in such an unsettled condition as to justify and call for an examination of the authorities."

Fay v. Parker.

Such an examination, however, the court declined, disposing of the whole matter in these words and no more: "In case of actual malice, the jury may award exemplary damages — what the plaintiff ought to receive and the defendant ought to pay — citing only *Symonds v. Carter*, *Whipple v. Walpole*, and *Hopkins v. The Railroad*.

In *Page v. Parker*, 40 N. H. 72, Mr. Justice FOWLER speaks of aggravating circumstances of indignity and insult, of abusive language, etc., as tending "to show the whole extent and degree of the injury."

In *Perkins v. Towle*, 43 N. H. 220, A. D. 1861, SARGENT, J., after a review of some of the English cases, to which reference will hereafter be made, concludes the opinion of the court with the remark that the court does not "intend by this decision to *extend* the doctrine of exemplary damages as held in this State, but to hold, simply, that exemplary damages may be recovered in an action of trespass *quare clausum fregit*, as well as in any other action where there are such circumstances of aggravation, of insult and of malice as would warrant such recovery."

It will be observed that precisely such damages as are there called exemplary would be included within the term "compensatory," as used in the instructions to the jury in the case now before us.

We shall expect to show hereafter that the English cases cited, viz., *Merest v. Harvey*, 5 Taunt. 230, and *Sears v. Lyons*, 2 Stark. 317, do not sustain the principle for which their authority is invoked; and that in those cases (as in the case of *Perkins v. Towle*), such damages as are called exemplary were, or might have been, given on the plain and fair ground of compensation merely.

Moore v. Bowman, 47 N. H. 494, A. D. 1867, is a case illustrating forcibly the unsettled and doubtful condition of the law as it is regarded in this State upon the point in question, the court holding that "an officer who attaches goods is not liable for exemplary damages, simply because he rashly and heedlessly took them without taking due care to learn the rights of the plaintiff."

In the opinion of the court, by BELLOWS, J., no more is said upon the subject than this: "Where the act complained of is malicious or wanton, or is characterized by gross negligence in the defendant, exemplary damages may be awarded according to the decisions in this State; but we are not aware that they have gone so far as the

rule in this case. In *Whipple v. Walpole*, 10 N. H. 180, the rule laid down was that exemplary damages might be awarded where there was gross negligence; and the rule laid down by Mr. Sedgwick, in his valuable work on Damages, p. 39, is that exemplary damages may be awarded whenever the elements of fraud, malice, gross negligence and oppression mingle in the controversy. This rule, however, is questioned in 2 Greenl. Ev., § 253 and note, where the authorities are extensively reviewed." "Upon the whole," he adds, "we are not disposed to extend the rule which allows exemplary damages to cases where the injurious acts are merely rash and heedless."

Towle v. Blake, 48 N. H. 92, A. D. 1868. Trespass for an assault and battery. The head-note is, "In torts involving circumstances of aggravation, and indicating malice, insult, oppression, wanton or willful violence, the jury may be instructed to give vindictive damages in compensation for the injuries received. The criminal prosecution is no bar to the civil suit at one and the same time."

The court instructed the jury that the defendant would be liable for all the damages to the plaintiff that were the natural and necessary consequences of the violence used by him, including both bodily and mental pain and suffering; and that to this the jury were at liberty to add a further sum, by way of exemplary damages, such as the defendant ought to pay and the plaintiff to receive.

NESMITH, J., says, "that the instructions as to the measure of damages seem to accord with the rules laid down in the elementary books, that in torts involving circumstances of aggravation, showing malice, insult, oppression, wanton or willful violence, courts are at liberty to instruct a jury that they may find exemplary damages, such as the plaintiff ought to have and the defendant ought to pay."

Observe, that the rule here laid down is simply an interpretation or explanation of the language used by the court below in the charge to the jury. The instructions are approved as correct; and then the language above quoted is immediately appended, by way of more elaboration of the same doctrine, and obviously intended to express precisely the same thing.

When, therefore, NESMITH, J., speaking for the court, declares that exemplary damages, in the case then before the court, are such as the plaintiff ought to have and the defendant ought to pay, he means just what the judge at the trial meant when he said, "such

Fay v. Parker.

as the defendant ought to pay and the plaintiff to receive ;" and we suppose both judges, and those concurring in the opinion, meant that whatever the defendant ought to pay, *that* the plaintiff ought to receive ; not that the plaintiff ought, by way of full compensation for the malice, insult, oppression, and wanton violence directed against and wounding his feelings, and so operating as a mental injury capable of being satisfied by compensatory damages strictly, to receive one sum, and then the defendant ought, by way of punishment, to pay another and further sum, which the plaintiff, by way of compensation, ought *not* to receive ; but, in short, that *all* the defendant should pay, under the unnecessary denomination of exemplary damages, were compensatory damages, neither more nor less. Such damages as these are those spoken of by Greenleaf, 2 Ev., § 266, when he says, "it is frequently said, that, in actions *ex delicto*, evidence is admissible in *aggravation* or in *mitigation of damages*. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of *the injury itself*. The circumstances thus proved ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive."

And again, § 272 : "Where an evil *intent* has manifested itself in *acts* and circumstances accompanying the principal transaction, they constitute part of the injury. * * And, generally, whenever the wrongful act of the defendant was accompanied by aggravating circumstances of indignity and insult, whether in the time, place, or manner, though they may not form a separate ground of action, yet, being properly alleged, they may be given in evidence to show the whole extent and degree of the injury."

Such damages are the same referred to by Chancellor KENT, where he speaks of the jury being at liberty to award damages "with a liberal hand ;" or, as Lord ABINGER said, in 1 Mees. & Wels. 342, that the jury, in regarding the wanton and oppressive conduct of the defendant, "should not be sparing in the damages."

Our court did *not* mean, any more than these distinguished jurists did, that when the defendant was made to pay such damages "as the defendant ought to pay and the plaintiff ought to receive," the plaintiff *ought* to receive, or the defendant ought to pay to him, a

Fay v. Parker.

mere fine, any more than to any other citizen, or to the affronted dignity of the State.

If our court *did* mean otherwise, the language adopted to express the doctrine was extremely unfortunate ; for the court, after expressing approval of the instructions of the jury in the manner alluded to, proceed as follows : " Where the conduct of the defendant clearly evinces motives and acts of a wanton, or of an excessive, violent, malicious, or evil nature, we think the jury may give, as *compensatory damages*, what are *usually denominated* vindictive damages."

This principle, in the form of language thus chosen to express it, is not modified by the impartial review which follows, of the contradictory views of Prof. Greenleaf and Mr. Sedgwick upon this subject, concerning which the organ of the court is careful to express no preference, by way of approbation or dissent.

In dismissing the further consideration of *Towle v. Blake*, it must be remarked that the instructions to the jury in the present case, namely, that they might give, by way of compensation, such damages as resulted from the indecency, outrage, insult, or indignity which injured Mrs. Fay's feelings, are sustained by the authority of *Towle v. Blake*.

It is equally clear that the further instructions, namely, that they might also give exemplary damages which would be punitive and not compensatory, if they thought it a case in which an example ought to be made for the protection of the public, derive no support from the authority of *Towle v. Blake*.

Cram v. Hadley, 48 N. H. 191, A. D. 1868, was trespass *quare clausum*, and in the circumstances, was not a case where exemplary damages, in any view, could be claimed. All that is said upon the subject is contained in this language of SARGENT, J.: " It is only where the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, that exemplary damages are to be given."

Taylor v. The Grand Trunk Railway, 48 N. H. 303, A. D. 1869. This case contains a somewhat lengthy review of the authorities upon the subject of exemplary damages; not, of course, of the majority of them, which would be impossible, so numerous have they become, nor, indeed, of some of the most prominent cases.

To some of those referred to in support of the views there expressed, as well as to others not mentioned, reference will be made hereafter. The works of the text-writers, Greenleaf, Sedgwick,

Metcalf and Kent are also considered, and a preference expressed for the opinions and conclusions of Mr. Sedgwick.

The substance of the decision is a full indorsement of the doctrine of exemplary or punitive damages, over, above and beyond compensation, in cases of malicious tort or gross negligence.

The opinion by BELLOWS, J., contains *dicta* expressing concurrence in the doctrine that such damages are not incompatible with the infliction of punishment, at the same time, by fine, under criminal procedure.

Holyoke v. The Grand Trunk Railway, 48 N. H. 541, A. D. 1869. NESMITH, J. "Plaintiff is to have a reasonable satisfaction for actual suffering of both body and mind. Also exemplary damages may sometimes be recovered in this form of action, embracing cases of gross negligence."

Belknap v. Boston & Me. R. R., 49 N. H. 358, A. D. 1870. Trespass for an assault, and ejecting the plaintiff from the defendants' cars. The court dispose of the question of damages by expressing the language of Mr. Sedgwick (Damages, § 38): "When either of these elements (*i. e.*, fraud, malice, gross negligence or oppression) mingles in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule, and permits the jury to give what is termed punitive, vindictive or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender."

All these remarks were wholly unnecessary to the decision of the question before the court. It was sufficient to say, as the court did, that none of the supposed elements of exemplary damages existed in the case.

The remarks, however, none the less indicate the view entertained by the author of the opinion upon this subject. It will nevertheless be observed that all the elements of damage referred to are such as are taken into consideration in estimating purely compensatory damages. The precise point raised by the present inquiry did not arise there, since the offense charged upon the corporation was not the subject of an indictment.

Woodman v. Nottingham, 49 N. H. 387, A. D. 1870; S. C., 6 Am Rep. 526, was *case* against a town to recover damages for injuries received in consequence of a defective highway.

The point decided was that the statute regulating this subject does not contemplate exemplary or vindictive damages to the suffering party.

But, if the common law contemplates such damages in the case of corporations guilty of gross negligence, it is not quite easy to see *why* the statute, which has no expression upon the subject, does not contemplate such damages, unless it be that an indictment will lie against the town for the negligence resulting in the defective highway.

As being the latest decision in our State in which the question of exemplary damages is considered, the remarks of the court upon the subject possess no little significance. The court, NESMITH, J., say: "We have interpreted the word *damages* to mean here a compensation, recompense or satisfaction to a party plaintiff for an injury actually received by him from the defendant, and precisely commensurate with the injury, whether it be to his person or estate," citing 2 Greenl. Ev., § 253.

The court below instructed the jury that they might give exemplary damages if, in their judgment, the circumstances warranted it. But the court above said: "We are aware that exemplary or vindictive damages have, under instructions of the court, been sometimes given by juries in this class of actions against towns. In this State the case of *Whipple v. Walpole*, 10 N. H. 130, is referred to as the leading authority to justify such a verdict. The facts in that case seem to have made out a case of gross negligence, therefore the plaintiff seems to have been entitled to claim a higher *compensation* [the word is italicised] than he would have been entitled to, had the agents of the town exercised more diligence in meeting the just claims of the plaintiff. It appears to us the true measure of damages should be limited, and measured by the *rule* to *one full, actual compensation* [italicised] for the injury received; neither more nor less. Professor Greenleaf, in his able treatise on this subject, *well remarks*: 'If the plaintiff's injury be aggravated by the criminal act or neglect of the defendant, by evidence of recklessness, insolence, wanton or malicious or oppressive violence, and the like, on the part of the defendant, all such conduct should be properly considered in estimating the plaintiff's *actual* [italicised] damage, and *objects* [italicised] to making up a larger sum in the form of *punitive or vindictive* [italicised] damages.' 2 Greenl. Ev., note to § 253."

If this is not a full and square indorsement of Professor Greenleaf's theory, by the same court which had very recently expressed its disapproval of the same, it would be difficult to find appropriate language with which to signify such indorsement and approval. Between these two cases, *Belknap v. The Railroad* and *Woodman v. Nottingham*, decided by the same judges (*quorum pars fui*) at the same term of court, there is no conflict concerning the questions required to be decided; but, at the same time, there seems to be no agreement between the *dicta* of the learned authors of the respective opinions.

The court, in *Woodman v. Nottingham*, cite *Emblem v. Myers*, 6 H. & N., to which reference will hereafter be made, as an authority in support of the views expressed.

These, I believe, are all the cases which our own reports afford, touching the subject now under consideration.

Is the question now before us legitimately open for consideration at this time, or is the question settled?

Only one case, *Towle v. Blake*, raises and decides the precise question here presented, as to the compatibility of the doctrine of two punishments of precisely the same character, at the same time, for the same offense, the one by civil and the other by criminal procedure.

Probably a majority of the cases indicate the view of the courts, that, independent of any considerations concerning the application of the criminal law, exemplary damages may be awarded as punishment and not as compensation, in cases of express fraud, malice, indignity, wantonness, oppression, insult, cruelty, etc.

Not one of these cases, in my view of them, treats of any element of damage such as is called vindictive, punitive, or exemplary, which might not properly be considered in estimating the compensatory damages which, under such circumstances, everybody concedes the injured party might justly receive.

Not one of them goes so far as to hold that the same elements of damage may be three times considered and damages three times awarded, once to the plaintiff as a compensation, again to the plaintiff by way of punishing the defendant, and again, by way of fine under the criminal law.

Not one of them goes so far even as to hold that the same elements of damage may be twice considered and damages twice awarded, once to the plaintiff as a compensation for an actual injury sustained,

and again to the plaintiff as a punishment of the defendant; because, wherever the elements of exemplary damages are considered, they are invariably regarded and spoken of as something additional to and other than the elements going to make up what is sometimes called *actual* damage.

Not one of them adopts the rule, in words, in spirit, in intention, or in substance, expressed by the instructions in the present case, namely, to this effect, that the jury may consider all the elements which anybody ever claimed could enter into the calculation of exemplary damages, and give such damages to the plaintiff as *compensation*, to be included in the *actual* damages, and then give the plaintiff exemplary damages for the "purpose" of punishment, and for the sake of the public example.

Perhaps it would not be erroneous to say that the question has not been thoroughly examined and very carefully considered, but has been suffered to lean upon and sustain itself by the supposed weight of authority, rather than to stand upon principle and inherent strength.

At any rate, in view of the more recent cases, wholly contradictory and irreconcilable as we have seen them to be (compare *Hopkins v. The Railroad*, *Belknap v. The Railroad*, and *Taylor v. The Railroad*, with *Woodman v. Nottingham*, the latest of them all), we are constrained to adopt the language of Judge CUSHING in *Symonds v. Carter*, and to say, as he said in the year 1859, "the doctrine in regard to vindictive damages seems to be *now* in such an unsettled condition as to justify and call for an examination of the authorities."

"By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another." *Ruthf. Inst. B.* 1, ch. xxii, § 1; *Grotius*, Lib. II, cap. xxii, 2.

"The definition of damage extends the notion of it beyond a man's goods. His life, his limbs, his liberty, an exemption from pain, his character or reputation, are all of them his own, in a strict and proper sense; so that the loss or diminution of any of them gives him a right to demand reparation from those by whose fault they have been lost or diminished. *Id.*

"He who has maimed another does not make him full reparation for the damage sustained, unless he pays for the cure, and gives him, besides such payment, the value of what he has lost by being rendered incapable to earn so much by his labor as he otherwise

might have earned if he had not been maimed." Such is Rutherford's translation of Grotius, Lib. II, cap. xvii, § xiv.

But he tells us these particulars, which all that Grotius mentions, do not include the whole of the damage. And after enumerating several other elements, he continues: "The person who is maimed has a right to freedom from causeless pain; and he who has hurt him has injured him in this right. He may therefore demand *smart money*, or some consideration in amends for the pain which he has unjustly suffered. Now, under this head we may fairly include any blemish which remains after the first smart or pain is over; for, as far as the injured person had a right to be free from such blemishes or from the uneasiness which any deformity will occasion him, he has a right to be paid for having them brought upon him. If the person who has been ill-treated should escape without losing his limbs or the use of them, yet, if he has been wounded, the expense of cure, the loss of time, the pain which he has felt, are all of them damages, for which reparation is due. Or if he has been only beaten, so that there has been no expense of cure and no loss of time, he has still a demand of *smart money*, or of *satisfaction* for the pain that he has felt.

"What has been said concerning maiming, wounds, or blows, will be sufficient to show what sort of amends is due to a man who has been deprived of his liberty by unjust imprisonment. His loss of time is one article in the account, but it is not the only one; the mere uneasiness of such a situation, under which we may include the disgrace attending it, is a damage to him." Id., § 10.

We see here how carefully the idea of damage is limited to reparation and compensation for injury to that which is strictly a man's own, and the idea of punishment for the pecuniary advantage of the injured party or for public example, to the pecuniary profit of the individual, is as carefully excluded. And it is interesting as well as instructive to observe that one hundred and twenty years ago the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart.

Pufendorf discourses thus: "*Lors que le juge donne le choix à la personne volée, ou de recouvrer son bien, ou de faire pendre le voleur: car si elle choisit le dernier, elle n'a plus rien à prétendre.*"

Mais comme l'usage des Peines doit être réglé sur l'utilité publique, et non pas sur la passion ou sur la caprice des particuliers ; un juge ne fait pas bien de laisser une telle chose en la disposition de la personne lésée. Pufendorf, Le Droit de la Nature et des Gens., Liv. III, ch. 1, § 11.*

What are now called exemplary, vindictive or punitive damages seem to be entirely unknown to the civil law. It is true that the measure of damages is regulated by the character, quality and motive of the act from whence the injury proceeds; and the judges, who, under the ordinances of France, "regulate" the damages, take all the circumstances of aggravation or mitigation into account.

In a case of injury resulting from an innocent act, "we ought," says Domat, "to moderate the reparation that is to be made * * but knavish dealing cuts off all pretensions to any mitigation of the damages."

"Thus, for example, if a creditor causes his debtor to be thrown into jail, when he has no right to use the said constraint, whether it be that his debt does not give him that power, or that the age of his debtor or some other cause does make the said imprisonment to be unjust, and the said debtor is a day laborer or other person who by his labor maintains his family, which, for want of this assistance, suffered likewise other losses, it will depend on the prudence of the judge to regulate a reparation both for the loss of the day's work of this prisoner, and for the other damages, according as the injustice of the said creditor may deserve, upon consideration of the circumstances." 1 Domat's Civil Law, by Strahan, Pt. I, Book III, Tit. V.

But the whole idea running through this measure of damages is reparation and compensation, not punishment. All this is very plainly shown by the examples cited in the same chapter. Tit. V, § 2, Art. VIII, and notes.

Thus, again, we are told that the Emperor Justinian, in order to avoid perplexity and difficulty, by a law "reduced all the cases where there happen any damages to two kinds. The one is of those

* Whenever the judge has given to the plundered person his choice whether to recover his goods or to cause the robber to be hung, if he choose the latter he has no further claim. But as the infliction of punishment should be administered with a view to the public good, and not with a view to the passion or caprice of individuals, the judge ought not to leave such a matter to the determination of the injured person.

Fay v. Parker.

cases where the question is about a certain quantity, or which have their nature fixed and regulated, such as sales and leases; and under this kind he comprehended all contracts. The other kind is, of all the other cases whatsoever, without distinction, whatever might be the cause of the damage.

"As for the cases of the first kind, which have their nature fixed, and where the question is concerning a certain quantity, he established it for a rule that the damages should not exceed the double of the said quantity; and, as to all the other cases where there should happen any damages, he ordered that they should be regulated by the prudence of the judge, according to the estimate of the real damage that was sustained." *Id.* Pt. I, Book III, Tit. V, Pl. 1936, 1937.

"Damages," says Professor Greenleaf, "are given as a compensation, recompense or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this, whether it be to his person or estate. All damages must be the result of the injury complained of. It is frequently said that in actions *ex delicto*, evidence is admissible in aggravation or in mitigation of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself. The circumstances thus proved ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive. Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages, are to consider, not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was willful, his mental agony also; the injury to his reputation, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort. And, on the other hand, they are to consider any circumstances of recent and immediate misconduct on the part of the plaintiff, in respect to the same transaction, tending to diminish

the degree of injury which, on the whole, is fairly to be attributed to the defendant.

“Where an evil intent has manifested itself in acts and circumstances accompanying the principal transaction, they constitute part of the injury, and, if properly alleged, may be proved like any other facts material to the issue. Thus, in trespass for taking goods, besides proof of their value, the inconvenience and injury occasioned to the plaintiff by taking them away, under the particular circumstances of the case, and the abusive language and conduct of the defendant at the time are admissible in evidence to the jury, who may give damages accordingly. And evidence of improper language or conduct of the defendant is also admissible under proper allegations, in an action of trespass on the case, or of trespass *quare clausum fregit*, as constituting part of the injury. And, generally, whenever the wrongful act of the defendant was accompanied by aggravating circumstances of indignity and insult, whether in the time, place, or manner, though they may not form a separate ground of action, yet, being properly alleged, they may be given in evidence to show the whole extent and degree of the injury.” 2 Greenl. Ev., §§ 253, 254, 266, 267, 272.

On the other hand, Mr. Sedgwick lays down the rule in these terms: “Where the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender.” This rule, he says, seems settled in England and in the general jurisprudence of this country. Sedgwick on Damages (5th ed.), 34. Id., ch. 18, *passim*.

For a rule that seems settled in England and America, it is quite remarkable that the learned jurists, who set up and maintain doctrines diametrically opposite, should be able to present such formidable arrays of authorities in support of their respective opposing theories as are exhibited in the celebrated note to sec. 253 of the later editions of Mr. Greenleaf's book, and the equally voluminous notes to the 18th chapter of Mr. Sedgwick's treatise; and that the one should take comfort from the assumed support of Judge Metcalf, and that the other should point triumphantly to Mr. Chancel-

lor Kent as having *decided* the controversy in his favor. See Sedg. on Dam. 466*, note.

But what is Chancellor Kent's *decision*? "It appears to me," he says, "that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to exclude all considerations of the malice and wickedness and wantonness of the tort, in estimating a *proper compensation for the victim*, is impracticable, visionary, and repugnant to fine feelings of social sympathy."

It is quite evident that the distinguished chancellor had no reference to Prof. Greenleaf in these remarks, for the rules laid down by Prof. Greenleaf would not sanction, but would absolutely forbid such criticism, and a reference to 1 Kent's Com. 606, note (11th ed.), shows that the blow is directed against an article in the *Boston Law Reporter* of April, 1847, wherein somebody discoursed as follows: "There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has accidentally injured him, his loss being the same in both cases. It better accords, indeed, with our natural feelings, that the defendant should suffer more in one case than in the other; but points of mere sensibility and mere casuistry are not allowable to operate in judicial tribunals; and, if they were so allowed, still it would be difficult to show that a plaintiff ought to receive a compensation beyond his injury. It would be no less difficult, either on principles of law or ethics, to prove that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, co-extensive."

What, then, in fact, is the learned chancellor's decision?

We find it in his note to page 15*, vol. 2 (11th ed.), of his Commentaries: "The rule of * * damages * * for a *compensation for civil injuries* to the person or property or character, has been recently discussed * * by Theodore Sedgwick, Esq. * * The general rule is, that, if a case be free from fraud, malice, willful negligence, or oppression, the *compensation* is taken strictly for the *real injury or actual pecuniary loss* to the party, and perhaps the natural and legal consequences of the act complained of, and the actual costs and expenses sustained. But, if fraud, malice, and *mala mens* mingle in the controversy, the claim goes beyond *absolute compensation*, and punitive, vindictive, or exemplary damages, by way of punishment and for example's sake, seem to be admitted.

* * It follows necessarily that, except in matters of contract, the amount of damages, when bad passions or motives are intermixed, must be left to the sound discretion of a jury. * * But, in cases of loss without aggravation or intentional wrong, the law confines itself to a complete indemnity without adding exemplary damages, or estimated profits, or remote consequences."

Then he remarks upon remote and consequential damages, and adds, "in the *Law Reporter* * * there is an article on exemplary damages, endeavoring to show that the decisions do not * * go beyond *compensatory* damages. * * On this subject, it appears to me that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to *exclude* all considerations of the *malice* and *wickedness* and *wantonness* of the tort, in estimating a *proper compensation* to the victim, is impracticable, visionary, and repugnant to just feelings of social sympathy."

This note begins with a reference to "*compensation for civil injuries to person, or property, or character.*"

The first natural suggestion upon reading it is the inquiry, how can a sum, assessed as a fine for the violation of the criminal law, for the protection of the public, be a part of a *compensation* to an individual for a civil injury?

It is not possible that so accurate a writer as Kent (if he had considered the point carefully) could have intended to include such a fine in such a compensation; and his whole note, taken together, shows he meant no such thing.

Again: "*Compensation for civil injuries to person, or property, or character.*"

An injury to *property* or *character* is totally different from an injury to the *feelings*. The feelings may suffer in consequence of an injury to person, property or character; but when we tell a jury they may give compensation for damage done to person, property or character, we are not understood to include compensation for mental agony resulting from injury to person, property or reputation.

The word "person," as used by Mr. Kent, evidently means the *material* person, — the fleshly body, and not the spiritual soul. Injury to person, property or character, and similar expressions, abound in the books, but they never convey the idea of a direct injury to the mind, or a production of mental suffering. Such suffering may be a consequential damage. But, if A plunges his

Fay v. Parker.

knife into B and burns his house and accuses him of forgery, and the person and property and reputation of B are injured thereby such injuries to person, property and reputation are not spoken of as injuries to the spirit, or soul, or mind. The knife causes pain, but the pain is always taken in the sense of bodily pain only; and if we have reference to the mental suffering, the sense of disgrace, the wounded honor, etc., we always go on to describe it by other words than "injuries to person, property and character;" we do not practically recognize those words as conveying the idea of a mental injury. By usage, no doubt, "injury to the person" might come to mean an injury to the spiritual as well as the physical part of man; but the phrase has not, in fact, been used in law in that sense.

This analysis was not in the mind of the eminent chancellor when he wrote his note. He did not pause to observe that one class of injuries was omitted in his enumeration, which enumeration is the one commonly used in the books. His attention was not called to the fact that in that enumeration, in the sense of the words as commonly used, one class of cases was omitted. But at the end of his note he breaks forth with indignation against the idea of "excluding all considerations of the malice and wickedness and wantonness of the tort, in estimating a proper *compensation*," "as visionary and repugnant to just feelings of social sympathy." He begins the note with "*compensation* for civil injuries," and he ends it with "*compensation*." It is *compensation* from beginning to end that he means, and it is *compensation* that he says.

When he says, "if fraud, malice and *mala mens* mingle in the controversy, the claim goes beyond *absolute* compensation," his meaning is explained by the context to be "beyond *absolute* compensation, for civil injuries to the person, or property, or character," that is, beyond damage to physical, material things. The claim is for injury to the feelings, an injury omitted in his enumeration of injuries to person, property and character. It is true that he did not examine the subject thoroughly and critically enough to express himself in this form; but the whole note taken together is capable of and consistent with this explanation, and is not capable of or consistent with any other.

Finally, the second and third sentences from the end of the note are conclusive. He understands the controversy between Mr. Sedgwick and the writer of the article in the *Law Reporter* to be,

whether "all consideration of the malice and wickedness and wantonness of the tort" should be excluded "in estimating a *proper compensation*."

Now, we insist that Mr. Sedgwick has no right to claim that Chancellor Kent has "decided this controversy" in his favor, simply because of (and it all rests upon that) an ebullition of the righteous indignation and the immense disgust of a righteous man and an eminent jurist, in view of the unaccountable and intolerable heresy of the *Law Reporter's* article.

We may not know precisely what the writer in the *Law Reporter* did really mean. Mr. Kent may have misunderstood him. We may not know for a certainty whether he contended for the exclusion of all considerations of malice, wickedness and wantonness, or whether, in fact, he only meant to contend against punitive damages in a literal sense. In the former sense Kent understood him, and was led to suppose that the question about punitive damages was, whether all considerations of malice and wantonness should be excluded *in estimating a proper compensation*. If the question really was (what Kent supposed the writer in the *Law Reporter* claimed it was), whether all considerations of malice and wantonness should be excluded "in estimating a *proper compensation*," I trust this court would agree with Mr. Kent, as would everybody who entertains "just feelings of social sympathy."

It is intolerable that the true rule of damages should suffer reproach from such misrepresentations as characterized the article in the *Law Reporter*; and applause should greet the boldness of speech of the eminent chancellor, roused by "just feelings of social sympathy" to protest against a doctrine so repugnant to "social sympathy," that it would be monstrous, if it were not, instead, ridiculous.

If an apology seems to be required for so elaborate a review of Mr. Kent's note, it will be found in the immense importance which is attached to it by one of the combatants in this great controversy. But the advocates of Professor Greenleaf's doctrine may well claim that the *decision* of the controversy by Mr. Kent is on *their* side and not on the other, and so they may "take pleasure in recording the approbation of an eminent man * * * whose life was one of uninterrupted and useful activity, and whose old age presented one of those beautiful pictures that we are sometimes permitted to behold—as satisfied in its retrospect as the imper-

Fay v. Parker.

fections of humanity allow, as hopeful of the future as an unwavering confidence in a higher power, and a consciousness of faculties neither wasted nor abused, may warrant." Sedg. on Dam. 466, note.

In a note to page 38 of his treatise on damages, Mr. Sedgwick concludes that the difference between himself and "the critics" is, after all, little more than a verbal one. So, indeed, it is if the question be simply whether certain elements of damage are to be regarded as compensatory or exemplary, the plaintiff in either event getting the advantage of them; but it manifestly becomes a matter of more than verbal consequence if the plaintiff is to receive and the defendant to pay for the same elements of injury and damage twice, once as compensatory and again as exemplary; *a fortiori* it is of more than verbal consequence if the defendant is required to pay for the same thing the third time, by a fine, for the benefit of the public.

Mr. Mayne, speaking of the admissibility of motive as an element in assessing damages, declares that malice may be shown. "If, then, malice can render an innocent act wrongful, a *fortiori* it must render a wrongful act more wrongful, and therefore be provable in aggravation of damages."

The recognition of this principle seems to him to decide "an important question, viz., whether damages are a compensation or a punishment." In cases of contract, he says, they are only a compensation, and frequently a very inadequate one. In cases of tort to the property, where there are no circumstances of aggravation, they are generally the same. "Where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, *they operate* as a punishment for the benefit of the community and as a restraint to the transgressor." Mayne on Dam. (2d ed.) 25.

He proceeds with the inquiry whether damages in cases of tort are a compensation or a penalty, and cites Buller's N. P. 27, and *Tullidge v. Wade*, 3 Wils. 18, A. D. 1769, to the point that the numberless cases in which damages totally disproportioned to the actual harm inflicted have been given and sanctioned, where the act was of a grossly unconstitutional nature, or attended with studied insult, can only be accounted for on the principle that damages in such cases are something more than a payment only for an injury.

Accordingly, he quotes WILMOT, C. J., saying, in *Tullidge v.*

Wade, an action for seduction, "actions of this sort are brought for example's sake; and, although the plaintiff's loss in this case may not really amount to the value of 20s., yet the jury have done right in giving liberal damages."

Do cases of the character of *Tullidge v. Wade* sustain the principle which Mr. Mayne and Mr. Sedgwick deduce from them? Do they not almost invariably disclose circumstances attended with studied insult; such cases as, in modern times at least, are admitted by all courts and jurists to come within the rule authorizing damages for the insult, by way of compensation, "*operating*," indeed, as Mr. Mayne says, "as a punishment?"

Did it occur to Mr. Ch. J. WILMOT that wounded feelings were an element of actual damage, as in later times it is universally allowed to be? or, was the idea of pecuniary compensation for mental sufferings a sentiment ethereal, intangible, and too refined for the age in which he lived?

Call them what you may, compensatory in fact, or punitory in their operation, if the same damages are awarded but once the distinction is merely verbal, and we may well doubt whether the learned chief justice, in recommending the award of damages with a liberal hand, intended any thing more or other than we mean, when we tell juries to give the plaintiff what the defendant ought to pay and the plaintiff ought to receive in view of the wrong and suffering inflicted by the malice, insult, and indignity exhibited by the circumstances of the case.

Blackstone defines damages as the money "given to a man by a jury as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass." 2 Bl. Com. 438.

"By damage, we understand every loss or diminution of *what is a man's own*, occasioned by the fault of another." 1 Rutherf. Inst., Book I, ch. 17, § 1, p. 385.

The learned writer last cited also says, "as the heirs of the criminal have no claim to such goods as he loses in the way of punishment, so neither has the injured person any, considered merely as the injured person. He has indeed a right to so much of the criminal's goods as will make him amends for the damage which he has suffered; but no reason can be given why he should have a right to more, unless some positive law has given him such a right. The ends which justify punishment will by no means extend his claim

Fay v. Parker.

any further than this. The criminal, by suffering in his goods, may be discouraged or prevented from offending again ; but a design to discourage or prevent him from offending again can be no ground for that person, whom he has injured by offending once, to claim property in the goods which he is deprived of. The ends of punishment may be answered by taking the criminal's goods from him ; but these ends do not require that the property which he loses should be vested in the person whom he has injured." 1 Rutherf. Inst., B. I, ch. 18, § 14, p. 434.

Mr. Tidd defines *damages* as "a pecuniary compensation for an injury." Tidd's Pr. 870.

The subject and the nature of damages in civil actions are treated of in *Child v. Sands*, Carthew, 296, and in *Savill v. Roberts*, id. 416 ; but punitive or exemplary damages are not enumerated among the kinds of damages which are said to be the foundation for an action.

Judge BOUVIER, in his law dictionary, Tit. "Vindictive Damages," while admitting that "the current of authorities sets strongly (in numbers, at least) in favor of allowing punitive damages," indicates most clearly his own opposition to the doctrine, saying, such a "view of the matter is certainly open to the objection that it admits of the infliction of pecuniary punishment to an almost unlimited extent by an irresponsible jury, a view which is theoretically more obnoxious (supposing that there is no practical difference) than that which considers damages merely as a compensation, of the just amount of which the jury may well be held to be proper judges. It would also seem to savor somewhat of judicial legislation in a criminal department, to extend such damages beyond those cases where an injury is committed to the feelings of the innocent plaintiff."

Comyns, treating of "damages—how assessed," nowhere intimates a power of assessment beyond or other than as compensation. 3 Com. Dig., Damages, E.

Mr. Justice BULLER, in all the chapters of his "*Nisi Prius*" on the subject of actions founded upon torts, has no word about exemplary, vindictive, or punitive punishment.

It is impossible to read these chapters (ch. 1, of Slander; 2, of Malicious Prosecution; 3, of Assault and Battery; 4, of False Imprisonment; 5, of Injuries arising from Negligence; and 6, of

Fay v. Parker.

Adultery), without the conviction that this eminent judge regarded damages, in all cases, as compensatory merely.

In chapter 3, page 21, he remarks that, by the Jewish constitution, he that hurt his neighbor was responsible on five accounts :

1. For the damages ; 2. For the pain ; 3. For the cure ; 4. For the cessation of work ; 5. For the affront or disgrace.

Whatever may have been considered as comprehended under the first head, there is, here, no intimation of any thing beyond compensatory damages.

But, if the Jewish constitution had proceeded with the enumeration of elements, as thus : 6. For an example to others ; 7. For punishment by way of fine, *pro bono publico*; and 8. For the same fine, also *pro bono publico*, by criminal procedure, it would have gone far in advance of the code which prescribed no more than an eye for an eye and a tooth for a tooth, and would have approximated the modern doctrine, as indicated by the instructions to the jury in the case before us.

Again, speaking of adultery, Mr. Justice BULLER says, "As the injury is great, so the damages given are commonly very considerable ; but they are properly increased or diminished by the particular circumstances of each case ;" but no damages by way of punishment or example are indicated.

Undoubtedly many of the cases cited and relied upon by Mr. Sedgwick, in support of his doctrine, sustain to the fullest extent the position assumed by him (see his text and notes, pp. 515-539); but some of them fall so far short of affording such support, as would seem to indicate a misconception of their true import and meaning.

In this latter category, as it seems to me, must be classed the case of *Tullidge v. Wade*, to which I have already sufficiently adverted.

The case of *Huckle v. Money*, 2 Wils. 205, A. D. 1763, is subject to the same criticism. "The personal injury done to the plaintiff," said Lord Chief Justice PRATT, afterward Lord CAMDEN, "was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient ;" but the jury who assessed £300 "saw a magistrate over all the king's subjects exercising arbitrary power, violating *magna charta*, and attempting to destroy the liberty of the kingdom * * endeavoring to support and

Fay v. Parker.

maintain the legality of the warrant in a tyrannical and severe manner, * * and I think they have done right in giving exemplary damages."

If Lord CAMDEN said no more than this, he said no more, in substance, than that for the outrage and indignity heaped upon the plaintiff by the insolence, oppression, and tyranny of the defendant, a jury might give the plaintiff liberal damages, and such as should *operate* (to use Mr. Mayne's language) by way of example.

In a note commenting upon this case, Mr. Tidd says, "It may, however, admit of a doubt whether, as the damages are intended merely as a compensation to the plaintiff for the injury he has sustained, they ought in any civil case to be exemplary, or given for the sake of example to other persons." Tidd's Pr. 889, note a.

Lord CAMPBELL, in his *Lives of the Chancellors*, Vol. V, p. 207, reports the lord chief justice as having said in *Beardmore v. Carrington*, 2 Wils. 244, "As to the damages, I continue of opinion that the jury are not limited to the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the wrongful act is held by the jury."

I do not know what is Lord CAMPBELL's authority for attributing this language to the lord chief justice. It is not to be found in the elaborate report of the opinion by Wilson.

Was it this supposed language of Lord CAMDEN which prompted Lord CAMPBELL, in giving a history of this case, to say, "The immense popularity which Lord Chief Justice PRATT now acquired, I am afraid, *led him into some intemperance of language*, although his decisions might be sound?" *Lives of the Lord Chancellors*, Vol. V, p. 249.

But what Lord CAMDEN did say, according to the original and almost contemporary report of Wilson, was very different. The application was, to set aside the verdict for excessive damages. And his lordship said, "for any thing we know, the jury might say 'we will make no difference between the minister who executed and the magistrate who granted this illegal warrant;' so the court must consider these damages as given against Lord HALIFAX; and can we say that £1,000 are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and pries into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days?"

It is an unlawful power, assumed by a great minister of state; can anybody say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the king's subjects? We cannot say the damages of £1,000 are enormous, and, therefore, the rule to show cause why a new trial should not be granted must be discharged."

Another case of similar character, and much relied upon by the advocates of exemplary damages, is *Merest v. Harvey*, 5 Taunt. 442, A. D. 1814, which was trespass *quare clausum*, wherein it appeared that the plaintiff, a gentleman of fortune, was shooting on his own estate, when the defendant, a banker, magistrate, and member of parliament, forced himself on the plaintiff's land, fired at game several times, and used very intemperate language. The jury found a verdict for £500; and, on motion to set aside for excess, GIBBS, C. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation in life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window; and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner: is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischief I have done.' Would that be a compensation? I cannot say that it would be."

Now, that is all that Mr. Chief Justice GIBBS said, in *Merest v. Harvey*, about exemplary or punitive damages.

But Mr. Justice HEATH interposed and said: "I remember a case where the jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."

Now, notwithstanding the remark of Mr. Justice HEATH, which may indeed reflect his view of the propriety of punishment in dam-

Fay v. Parker.

ages, beyond compensation, I fail to see in this case any element of damage other than such as would fall naturally within the doctrine of compensation for actual injury sustained by the plaintiff from the insult and oppression visited upon him.

Sears v. Lyons, 2 Stark. N. P. 317, is another of the cases on which Mr. Sedgwick plants his doctrine. This case was trespass for breaking the plaintiff's close, and laying poison upon it with intent to destroy the plaintiff's poultry.

Gurney, for the defendant, contended that the plaintiff was not entitled to recover greater damages than the value of the fowls, and that the jury could not take into consideration the malicious intention conceived by the defendant.

Why not, if the doctrine of exemplary and punitive damages was then so well settled as has been supposed? And this was only a little more than fifty years ago — A. D. 1818.

ABBOTT, J., charged the jury that it had always been held that, in trespass *quare clausum*, a jury might consider, not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury; at the same time he cautioned the jury to guard their feelings against the impression likely to have been made by the defendant's conduct.

Now, it must have been observed that language similar to that of Mr. Justice ABBOTT's is well-nigh universal in the English cases of his time and prior thereto.

What does it mean? Clearly nothing more than to mark a distinction between physical damage, so to speak, very often called actual damage — an injury to a man's person or to his material property, on the one hand, and mental damage, or an injury to spiritual or psychological things, on the other hand. In ancient days, if not in the present, a jury would perhaps regard only the former, unless their attention was directly called to the question whether the plaintiff's feelings were injured by what Mr. Justice ABBOTT called the insult of the defendant's act. Instructions of this character merely authorize the award of damages for an injury done to the plaintiff's feelings by the outrage and insult of the defendant's act, as well as for injury done to his property, or his material person, by the act itself.

Leith v. Pope, 2 Wm. Blackstone, 1327 (*anno* 20 Geo. III), was an action for malicious arrest and prosecution of the plaintiff on a charge of horse-stealing.

DEGREY, J., said not a word about vindictive or exemplary damages, *eo nomine*; but he said this: "Now, the plaintiff is a man of family, a baronet, an officer in the army, and a member of parliament, all of them respectable situations, and which may render *the value of an injury done to him*, especially when directed against his life, adequate to £10,000," the amount of a verdict which the court refused to set aside for excess of damage.

In an action for debauching the plaintiff's daughter, the jury gave £200 damages. Upon motion to set aside the verdict for excessive damages, Lord ASHURST said: "The damages are considerable; and, if we had been on the jury, we possibly might have been disposed to have given a smaller sum." *Bennett v. Allcott*, 2 Term, 166, A. D. 1787.

There was no suggestion of accounting for the verdict on the ground that the jury had exercised the prerogative of adding exemplary to compensatory damages.

Pleydell v. The Earl of Dorchester, 7 Term, 529, A. D. 1798, was trespass for diverting a water-course. Verdict, £3,000. The court set it aside as being excessive and not warranted by the evidence, though they said that, even in a case like the present, which was attended with several circumstances of aggravation, they would not measure the damages which the jury had given in a nice balance.

It did not occur to the court to say, "these circumstances of aggravation warrant exemplary and punitive damages."

And in *Duberley v. Gunning*, 4 Term, 651, A. D. 1792, a motion to set aside a verdict of £5,000 damages for crim. con. was strenuously resisted by ERSKINE, WOOD and SHEPHERD, in an argument of considerable length, in which no suggestion was made in favor of supporting the verdict on the ground that the jury had the right to assess exemplary damages; but counsel contended that "where the spirit is principally wounded and the future happiness of the sufferer destroyed," "damages for such an injury suffered by the husband" must rest in "the judgment of the jury"—being "incapable of ascertainment by reference to any known rule." And the counsel cited the case of *Wilford v. Berkley*, *ante*.

ASHURST, J., assenting to this view of the matter, said, "Where damages depend in anywise upon calculation, the court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide

Fay v. Parker.

them, where the damages depend upon mere sentiment and opinion, the court have no line to go by.

GEORGE, J., was of opinion that, even if the court had power to interfere, they ought not to do so "for the first time, in a case like the present, where the adulterer is a married man and has taken away his friend's wife. If we were to grant a new trial, I should feel myself greatly at a loss to point out to the jury what line they ought to take."

The whole case goes upon the ground of compensatory damages, depending upon the mere sentiment and opinion of the jury.

If there was any known rule — such as that of punishment for an example — by which to regulate the assessment of damages, it was not recognized by Lord KENYON, and Judges ASHURST, BULLER, and GEORGE, who had "no such light to guide them." Lord KENYON, at *Nisi Prius*, in summing up the evidence, had told the jury that they were to assess "what damages, under all the circumstances, the plaintiff was entitled to."

Wilford v. Berkley, 1 Burr. 609, A. D. 1758, was an action for criminal conversion. The court said, "The injury suffered by the husband, and the estimate of the damages to be assessed, must, in their nature, depend entirely upon circumstances."

In a latter case of similar character, *James v. Biddington*, 6 C. & P. 589, A. D. 1834, another of Mr. Sedgwick's cases, the declaration in case contained three counts: 1st, for the criminal conversation; 2d, for harboring the seduced wife; 3d, trover, for her wearing apparel.

It was held that evidence of the amount of the defendant's property was properly rejected at the trial. ALDERSON, B., said, "In a case of this kind, a plaintiff is entitled to so much damage as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the cause. In a case of breach of promise of marriage, the amount of the defendant's property is material, as showing what would have been the station of the plaintiff in society if the defendant had not broken his promise."

We see here, that Baron ALDERSON, less than forty years ago, held to no such doctrine as exemplary damages in a sense other than as comprehending compensation, in cases of this character.

Forde v. Skinner, 4 C. & P. 239, is a case in which damages for an injury to the plaintiff's feelings were called an "aggravation of

damages," by the defendant's malicious intent to take down a female pauper's pride by cutting off her hair, being a great injury to her feelings, and ordinarily spoken of as ground of exemplary damages.

Pearson v. Lemaître, 5 M. & G. 700, A. D. 1843, is one of the cases always cited to sustain the doctrine of punitive damages; and yet, in that very case, TINDAL, C. J., said (p. 720), "Upon principle, we think that the *spirit and intention* of the party publishing a libel are fit to be considered by a jury, in estimating *the injury done to the plaintiff*." He said nothing about punitive or exemplary damages, and, indeed, there is nothing of that character (properly so called) in the case; it is all compensatory for the injury done to the plaintiff, that injury being more or less, according to the "spirit and intention" of the defendant—as in the case of the hat knocked off, which Mr. Justice HEATH so well remembered.

The comparatively recent case of *Emblem v. Myers*, decided in 1860, 6 H. & N. 54, forcibly illustrates the ideas which I have endeavored to express.

The head-note is, "In an action for willful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, the jury may give exemplary damages."

The defendant caused his own building to be pulled down in such a reckless manner as to greatly injure the plaintiff's adjoining stable and property therein. The act was accompanied by insolence and contempt of the plaintiff's rights.

WILDE, B., charged the jury that for the defendant's negligence they should give such damages as would be a reasonable compensation for the injury the plaintiff had sustained; but if the defendant acted willfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession of the stable, they might find exemplary damages.

Here, it is manifest, "the injury the plaintiff had sustained" means the pecuniary injury, the injury to property; and "exemplary damages" means compensation for an injury to the plaintiff's feelings. And the way in which it is expressed illustrates the loose and incorrect language on this point with which the books are filled.

In the course of the argument, POLLOCK, C. B., said that if the defendant did not intend any wrong, the verdict should be

Fay v. Parker.

limited to "the damages really sustained; but if the injury was committed in an insolent way, they might take into consideration the motive, and give exemplary damages." Here is the same unaccountable use of language. "The damage really sustained" evidently means the damage to the plaintiff's property; and "exemplary damages" as evidently means damage to the plaintiff's feelings by the defendant's manifested "motive" and "insolent way."

An accurate translation of the terms used into correct legal phraseology, nay, into any diction which shall faithfully and truly express the real meaning and intention of the judges, causes the idea of exemplary damages, in the sense of vindictive damages — the sense in which they were apparently, but unintentionally used — to vanish into thin air, and utterly disappear.

Is this all a senseless quarrel about words? Yes, so long as the true meaning is understood and unobscured; but when the inadvertent and careless use of such language leads to such a misunderstanding as must promote injustice in a given case, and, by adoption as precedent and authority, shall finally ripen into unconstitutional injustice, it is no longer a matter of verbal insignificance, but it becomes a matter of very grave importance.

The opinions of the judges, in the case last cited, present the point of this contention very vividly.

POLLOCK, C. B., says damages may be aggravated by the contemptuous and insolent manner of doing a wrong to property. Certainly. The contemptuous and insolent manner in which the defendant smashed in the plaintiff's stable over his wife, who was inside, and his horse and his cart, might injure the plaintiff's feelings more than the act itself injured his property. And if you choose to call compensation for such an injury done to the plaintiff's feelings by the defendant's contemptuous and insolent act "exemplary damages," no harm results from the misnomer, provided juries and the courts understand that "exemplary damages" means compensation for injury to the plaintiff's feelings. The trouble is, such language is persistently misunderstood.

POLLOCK, C. B., also said (furnishing another instance of the looseness of diction which was employed in speaking of damages), "The courts have always recognized the distinction between giving damages with a liberal and a sparing hand."

And BRAMWELL, B., said, "Damages might be given for the insult,

as well as the actual injury." In other words, the injury inflicted upon the feelings by an insult is not an actual injury in the legal vocabulary of the Court of Exchequer.

But of what consequence is it whether damages given for insult and oppression are *called* compensatory or exemplary, liberal or sparing? Of none, whatever, till fundamental constitutional rights are imperiled and overthrown by a misconception of the meaning of words; then it becomes high time to express ideas in language which cannot be misunderstood.

In *James v. Campbell*, 5 C. & P. 372, A. D. 1832, which was trespass for an assault, BOSANQUET, J., told the jury, "If the defendant struck the plaintiff, the latter is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages."

That is the whole of this case. Mr. Sedgwick regards it as authority in support of his doctrine. And Mr. Sedgwick seeks to fortify his position by such a case as *Rogers v. Spence*, 13 M. & W. 571, A. D. 1844, which was trespass of an aggravated character, to the disturbance of the possession of an assignee in bankruptcy.

Lord DENMAN, C. J., said no more than this concerning the damages: "Substantial damages may be recovered in respect of the assignee's right of possession, though no loss or diminution in value of the property may have occurred."

In *Doe v. Filliter*, 13 M. & W. 47, A. D. 1844 — cited by Mr. Sedgwick — POLLOCK, C. B., said, "In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into consideration."

This remark was in reference to the plaintiff's claim to recover, as damages, full costs of a former action, in a subsequent suit for vexatiously prosecuting the former action. Full costs were not allowed; but "the *taxed* costs are a fair *indemnity*," said the chief baron, ALDERSON, GURNEY, and ROLFE, BB., concurring.

The principle upon which damages are regulated in cases of seduction has been, as we have seen, sometimes regarded as anomalous and indefinable — *Davidson v. Goodhall*, before cited, *ante*. Mr. Hilliard refers it to the doctrine of "exemplary damages, beyond the mere loss of service and payment of necessary expenses." In the same breath he undertakes to specify these "exemplary damages;" "and the jury, in assessing damages, may take into view the wounded feelings of the plaintiff, and not only

 Fay v. Parker.

recompense him, but punish the defendant, according to the aggravation of the offense. They may award him compensation for the destruction of his domestic peace, as well as the disgrace cast upon his family." 2 Hilliard on Torts, 602. Here in the compass of a dozen lines, are damages spoken of as exemplary, as compensatory, as punishment, and as a recompense, and all, we submit, meaning *the same damages*.

But the English courts, in comparatively recent times even, were unable to recognize the doctrine of exemplary damages as applicable to this class of cases; for Lord ELLENBOROUGH said that the action of seduction was "a case *sui generis*, where, in estimating the damages, the *parental feelings*, and the feelings of those who stood *in loco parentis*, had always been taken into consideration; and although it was difficult to conceive upon what legal principles the damages could be extended ultra the injury arising from loss of service, yet the practice was now inveterate, and could not be shaken." *Irwin v. Dearman*, 11 East, 23.

In *Andrews v. Askey*, 8 C. & P. 7, A. D. 1837, TINDAL, C. J., said to the jury, "You are not confined to the consideration of the mere loss of service, but may give some damages for the distress and anxiety of mind which the mother has felt. If you find for the plaintiff, you will take into consideration the situation in life of the parties, and say what you think, under all the circumstances of the case, is a *reasonable compensation* to be given to the mother. And see, to the same effect, *Edmonson v. Machell*, 2 Term, 4.

Mr. Selwyn (2 Sel. N. P. 1116) says, "It may be remarked, that although this practice of giving damages for the wounded feelings of the party can scarcely be reconciled with the strict rule of law which entitles a person to recover only *secundum allegata et probata*, yet, when the nature of the vice of seduction and the pernicious consequences which result from it are duly considered, few persons (however anxious they may be that the boundaries between civil injuries and criminal offenses should be preserved as distinct as possible) will regret that such a practice has been adopted.

In *Edgell v. Francis*, 1 M. & G. 222, A. D. 1840, which was an action for trespass and false imprisonment, BOSANQUET, J., said: "We must look, not only at the fact of the plaintiff's being put into confinement, but at the charge on which he was given in custody. A more grave charge against a party in the plaintiff's situation in

Fay v. Parker.

life cannot well be imagined than that which the defendant saw fit to make against him; and if the jury had given small damages, his character might have been affected." And ERSKINE, J., added: "The question for the jury was, not what the defendant could afford to pay, but what was a fair compensation for the injury he had received;" but neither of the judges, nor the counsel trying to sustain the verdict, said any thing about example or punishment.

In *Williams v. Currie*, 1 M., G. & S. 841 (one of the cases relied on by Mr. Sedgwick), which was a case of aggravated and annoying trespass, the jury were restricted in their award of damages to a *fair compensation for the injuries sustained*, the only warrant for regarding it as a case sustaining the doctrine of exemplary damages being found in the remark of CRESSWELL, J., that the jury were not necessarily to restrict themselves to the actual amount of the loss of crops proved by the witnesses. "In cases of this sort," said the learned judge, "it is not to be expected that a jury will measure their verdict so nicely as in cases of contract."

Clissold v. Machel and ano., 26 U. C. 422, anno 30 Vict., in the Court of Error and Appeal, was an appeal from a judgment in the Queen's Bench in a case of trespass and false imprisonment.

RICHARD, C. J., said: "Though the defendants may deserve punishment, that is no reason why the plaintiffs should reap a reward beyond a fair indemnity, in consequence of the bad conduct of the former."

This case manifests the sound sense of the administrators of justice in the dominion.

Turning our attention now to a few of the most prominent American cases, it is worthy of observation that the courts of Massachusetts have steadily adhered to the doctrine of compensation, as affording the only true measure of damage.

Weld v. Bartlett, 10 Mass. 470, A. D. 1813 — one of Mr. Sedgwick's authorities — was case against a sheriff for the neglect and default of his deputy, whereby the plaintiff lost the fruits of a judgment recovered against one Hill.

PARKER, J., said: "The action is case and for a tort, in which it is peculiarly the right of the jury to assess the damages; and in which they are not restricted to any precise sum. They may give more than the former judgment if they believe the wrong was willful on the part of the officer; for they may and sometimes do add to the amount of the first judgment the expenses and costs not tax-

Fay v. Parker.

able in actions against the officer by way of damages * * * the great object of the action being *to restore the plaintiff to what he has lost* by means of the misdoings of the officer."

In *Richards v. Farnham*, 13 Pick. 451, A. D. 1833, SHAW, C. J., held that damages in tort may be awarded for willful injury to feelings. These damages are not spoken of by the court as other than compensatory; still Mr. Sedgwick affects to derive support from this case; but in the next—*Barnard v. Poor*, 21 Pick. 378, A. D. 1838—the same eminent chief justice affords him no consolation by holding that "It is immaterial whether the proof establishes gross negligence, or only want of ordinary care. In either case, the plaintiff would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages or otherwise."

Austin and ux. v. Wilson and ux., 4 Cush. 273, was decided in 1849. Present, SHAW, C. J., and WILDE, DEWEY, METCALF and FLETCHER, JJ., all concurring. It was a civil action for a libel by the female defendant upon the female plaintiff. On the trial the court instructed the jury that the term "compensation" included a remuneration for all the injury which the plaintiff had sustained, whether a pecuniary loss or an injury to the feelings or reputation; and that, so far as the actual malice of the defendant had a tendency to explain or give more force to the evidence, it might be taken into account for this purpose but no further; and by the term "exemplary" or "punitive" damages was meant such sum as in some cases juries awarded against a defendant as an example to deter others from similar acts, or as a punishment upon him for the act which was the subject of the action.

These definitions were held to be correct; but METCALF, J., said: "If exemplary, vindictive or punitive damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel and assault and battery. If they could, the defendant might be punished twice for the same act," citing *Taylor v. Carpenter*, 2 W. & M. 1, 22, in which WOODBURY, J. (SPRAGUE, J., expressing his concurrence), referred to 2 Greenl. Ev., §§ 266-272; 3 Am. Jur. 287-308; and 19 Pick. 216, as expressing the true doctrine, "under modern analyses and decisions on this point." He says: "In very corrupt or flagitious wrongs, if a criminal prosecution lies for the public offense, I do not see much justification for what are called

vindictive damages there, or smart money in the civil suit, as the criminal one covers them;" and in reference to the charge of the court below, he says: "If here, by *exemplary damages*, the judge meant a full indemnity for the individual wrong in every equitable view, and thus, by example, operating in a preventive manner the more effectually against a repetition of such injuries, then no error happened on his part. So, if he, in the hurry of the trial, used language which the jury were likely to construe as going beyond that range of indemnity, yet, in point of fact, the jury did not give more than was sufficient to make the plaintiff whole, but rather less than that amount, this state of things does not seem to constitute a good ground for a new trial. *Taylor v. Carpenter*, 2 Woodb. & M. 1.

Meagher v. Driscoll, 99 Mass. 281, A. D. 1868, is the latest Massachusetts case on the subject. It was trespass for breaking a burial lot, and removing the dead body of the plaintiff's child. FOSTER, J., expressed the opinion of the court as follows: "He who is guilty of a willful trespass, or one characterized by gross carelessness or want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate, as well as in other actions of tort. Acts of gross carelessness, as well as those of willful mischief, often inflict a serious wound upon the feelings, when the injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the mental *injury* is made greater by its wantonness."

There were present, and concurring in the decision of this cause, CHAPMAN, C. J., and HOAR, GRAY, FOSTER, WELLS and COLT, JJ. See, also, *Stowe v. Heywood*, 7 Allen, 123.

The Connecticut cases will be found to exhibit a singular degree of confusion upon the subject, illustrating most clearly the mischief resulting from the incorrect apprehension of the character and meaning of damages, when applied to things spiritual and mental, rather than purely material. This confusion and incongruity of ideas is specially exemplified in *Linsley v. Bushnell*, 15 Conn. 225, A. D. 1842 (cited by Sedgwick), in which, at *nisi prius*, the court

Fay v. Parker.

told the jury: "The law has fixed no definite rule of damages ; but the plaintiff is entitled to recover a fair and reasonable *indemnity* for the injuries he has received in his person and health, so far as you can, as reasonable men, *acting without vindictive feelings*, ascertain the amount. In actions of this character there is no rule of damages fixed by law, as in cases of contract, trover, etc. The object is the *satisfaction* and *remuneration* for a personal injury which is not capable of an exact cash valuation."

This is all well enough ; but the court above, not content to let well enough alone, while expressly approving and sustaining the charge, treat it as instruction to the jury that they might award exemplary damages, when (it seems to me quite clear) the judge presiding at the trial had no such intention or notion.

The court above, seemingly unable to conceive of *compensation* otherwise than by the application of such a market value as may be applied to a *material* loss, go on to *enlarge* and *explain*, while they commend, the charge to the jury as follows : "The circumstances of aggravation or mitigation, the injury to the plaintiff's business and means of livelihood, past and prospective, all these and many other circumstances may be taken into consideration by the jury in guiding their discretion in assessing damages for a wanton personal injury."

All this, too, is well enough, for all these considerations affect the plaintiff's actual *compensation*. It was, therefore, quite unnecessary to go on and say—what the court below found it entirely unnecessary to say, and what was not intended by the trial judge—"there is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and are, awarded by the verdicts of juries, in cases of wanton and malicious injuries."

This last paragraph illustrates the confusion of ideas which lies at the foundation of the great mass of cases which go to make up the authority, so called, for the imposition of double or treble damages, and a fine upon the top of all, under the denomination of exemplary or vindictive damages.

Therefore it was natural that *Huntley v. Bacon*, 15 Conn. 267, should follow, two years later, in the same track. The charge to the jury was: "If you find the trespass complained of was committed maliciously, or in a wanton or aggravated manner, and *with design to injure and vex* the plaintiff, you may render a verdict for

injuries, where the commission of the act complained of is accompanied with circumstances of aggravation;" which abstract proposition is needless for application, and only serves to show that vindictive and exemplary damages were there regarded as embracing every thing beyond the bare outlay of expenses.

In an earlier case, within the same jurisdiction, SIMPSON, J. J., declares that the right of the plaintiff to recover vindictive damages for personal injuries, where the commission of the act complained of is accompanied with circumstances of aggravation, has been so often recognized by the court that it must be regarded as a settled rule of law in Kentucky.

He then goes on to say: "This rule, when properly understood, is supported by principle, analogy and authority. The arguments used in opposition to the rule proceed on the erroneous assumption that vindictive damages are inflicted by way of criminal or penal punishment, and are not given by way of compensation for the injury complained of. Such damages may operate by way of punishment, but they are allowed by way of remuneration for the wrong suffered. * * * Such damages, although given to recompense the sufferer, do inflict a punishment upon the offender. * * * The damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury. It is therefore the increase of the damages resulting from the character of the defendant's conduct that is denominated punitive or vindictive." *Chiles v. Drake*, 2 Metc. (Ky.) 146.

This language of Mr. Chief Justice SIMPSON forcibly illustrates the suggestion already made, that it is of no sort of consequence what appellation you bestow upon a rule of damages which is, in fact, compensatory merely, if everybody understands the meaning of the terms employed. That Judge SIMPSON understood the matter very differently from the understanding of Mr. Sedgwick, who cites this case in support of his own views, seems to me quite apparent.

The case of *Ellsworth v. Potter*, 41 Vt. 688, furnishes an illustration of the application of the terms "exemplary," "vindictive" and "punitive" damages to such as belong in fact to compensation merely. Such is also the case of *Bonsall v. McKay*, 1 Houst. (Del.) 520, though the doctrine of exemplary damages is fully insisted upon.

Fay v. Parker.

In *Bannon v. The Baltimore & Ohio Railroad*, 24 Md. 123, A. D. 1865, the court in express terms declines to "adopt or deny" * * the proposition so elaborately discussed by the learned jurists Sedgwick and Greenleaf."

Barnet v. Reed, 51 Penn. St. 190, is another instance of the confusion which seems inseparable from the consideration of this matter by the courts. STRONG, J., held that the following instructions were unexceptionable: "Where the malice is only such as results from a groundless act, and there is no *actual* malice or design to injure, the rule is compensatory damages; but where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages; that is, damages to punish the defendant for his fraud and malice. Compensatory damages are such as indemnify the plaintiff, including actual loss or injury of property, loss of time and necessary expenses, counsel fees, and any other *actual* loss the plaintiff suffered."

Observe here the narrow and restrictive character of the *actual* damages for which, alone, *compensation* can be made.

Injury to the feelings, in the view of this court, is no *actual* damage; but for the infliction of the injury the defendant must be punished by paying to the plaintiff damages which he has not sustained.

This was in 1867, but the next year things became sadly mixed; for in *Carey v. Bright*, 58 Penn. St. 70, the following instructions to the jury were held to be correct: "The ordinary rule of damages, in trover, is the value of the property at the time of the conversion, with interest to the date of trial; although the jury are justifiable in going further where there has been an outrage in the taking, or vexation and oppression in the detention, *as a compensation to the party injured*."

But in *Penn. & Ohio Canal v. Graham*, 63 Penn. St. 290, damages for pain and suffering resulting from tortious negligence are not spoken of as exemplary or vindictive, but are comprehended within "*general damages*."

In *Fox v. Stevens*, 13 Minn. 272, which was a case for seduction, the jury were instructed that, besides loss of services and the disbursements for medical treatment and other necessary expenses, they could give such additional damages for wounded feelings, mental suffering, and for the dishonor of the plaintiff and his family,

as they should deem, from the evidence, to be a reasonable and just *compensation* therefor.

These instructions were approved; but the court seemed called upon to remark that, in cases of willful wrongs, it is settled that exemplary damages may be given. This, I suppose, was to show that mental sufferings and dishonor were things too ethereal and refined to be capable of sustaining *actual* damage.

In *Bussy v. Donaldson*, 4 Dal. 257, case for gross negligence, it is said: "As to the assessment of damages, it is a rational and a legal principle, that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages."

In *Freidenhart v. Edmundson*, 36 Mo. 226, HOLMES, J., said: "Exemplary damages would seem, in the ordinary and proper sense of the word, such damages as would be a good round compensation and an adequate recompense for the injury sustained, and such as might serve for a wholesome example in other like cases. As we conceive, this does not go beyond the sense of the rule, as laid down by Greenleaf, and certainly comes within the doctrine maintained by Sedgwick. Sedg. on Dam. 38, 453, 454. The jury may give damages beyond the value of the goods, for breaking and entering the store, seizing his property, putting his person in danger, breaking up his stock and injuring his business, and greatly annoying and disturbing him. 2 Greenl. Ev., § 253, and n.

"The more unsettled question, and what appears to be the principal thing in dispute between the authors above cited, whether the jury may in any case award merely vindictive and punitive damages, by way of punishing the defendant rather than compensating the plaintiff, proceeding on the ground that the general good and interest of society demanded such punishment, does not necessarily arise in this case; and we are not understood as sanctioning a principle which, by the nature of it, would seem to belong rather to the domain of criminal than civil jurisprudence."

In *McKeon v. Citizens Railway Co.*, 43 Mo. 79, the same judge said: "It is at least very questionable, upon principle and authority, whether damages for punishment can be given in any civil action. My own opinion is, they cannot."

One of the judges dissented, but did not express his views.

Green v. Craig, 47 Mo. 90, indorses the doctrine of exemplary

Fay v. Parker.

and punitive punishment to the fullest extent ; but there (as in most of the cases) all the damages called exemplary might have been just as well awarded for compensation only.

Cooke v. Ellis, 6 Hill, 466, is cited by Mr. Sedgwick as an authority in favor of exemplary and punitive damages in a case where the offense may also be punished by the criminal law, and the case undoubtedly goes to the full extent of that doctrine; but, if it is founded upon the authority of such cases as *Jacks v. Bell*, 3 C. & P. 316, cited there in support of the decision, it must be confessed that the support is feeble and reluctantly bestowed; for in *Jacks v. Bell*, Lord TENTERDEN said: "In this case there must be a verdict for the plaintiff; but the question will be as to the amount of the damages. These parties have been indicted, and now an action is brought against them. Here is a two-fold proceeding, a double harass, and a double vexation for one and the same offense. In actions for assaults, juries do not, in general, confine themselves to damages for the personal injuries sustained. I do not remember any instance in which a party has brought an action after having preferred an indictment and received a portion of the fine. * * You will therefore say, under these circumstances, what damages you think ought to be given to the plaintiff." Verdict, one farthing, followed by a severe reprimand of the plaintiff's attorney.

In *Smithwick v. Ward*, 7 Jones' Law (N. C.), 64, the court said: "We have felt some doubt whether vindictory damages ought to be given to a party in a civil suit, under any circumstances, where the case appears to involve, indubitably, the same principle and object that a punishment by the public does; and it would seem, therefore, more proper to keep them distinct. But the practice of allowing this element of damages has been so long followed in our Circuit Courts, that we do not think proper to disturb it."

That is to say, it seems to us *improper* to allow such damages in a civil suit; but some of the fathers have eaten sour grapes, and the children's teeth are set on edge; and we have conducted ourselves improperly for so long a time, and we have acted improperly because, for a long time, we misunderstood what we now understand, namely, that we were in error; that, on the whole, we prefer to trample under foot the sacredest maxims of the common law, rather than sacrifice the pride we feel in our stubborn consistency.

In *Hendrickson v. Kingsbury*, 21 Iowa, 379, the court, after a

long discussion of the subject, and a review of the relative positions of Mr. Sedgwick and Mr. Greenleaf, in which they insist that the controversy between those distinguished jurists is a mere quarrel about words and legal terminology, and, notwithstanding their conclusion in favor of the doctrine of exemplary and punitive damages as maintained by Mr. Sedgwick, do nevertheless admit that there must be some limit to the extent of the punishment by damages in a civil suit; and therefore they are careful to tell the world that "it must be remembered that the doctrine of giving damages as a punishment for the malicious or oppressive act of the defendant, if they are construed *as punishment*, must be limited to cases where the act done is not punishable by the penal or criminal laws of the State. For it is a principle of the common law, and one which is embodied in many of the State constitutions, that no person shall be twice punished for the same cause — *nemo bis vexari pro eadem causa.*" And, alluding to the special instructions in the case before them, the court remark that, "after telling the jury they may compensate the plaintiff, punish the defendant, and protect society and not scrutinize these amounts very closely, and that they may also add such further sum as will manifest the detestation in which the act is held by them, is, to speak mythologically, 'piling Pelion and Ossa on Olympus.'"

We agree with this criticism; and it occurs to us that if the same court had been dealing with the instructions in the present case, which go to the same extent, substantially, in a case, such as that was not, where the offense is also punishable by fine under indictment, the fertility of classical illustration would not have failed to summon up the figure of one whose form

"dilated stood,
Like Teneriffe or Atlas, unremoved;
His stature reached the sky, and on his crest
Sat horror,"—

that was not quite tall enough, and therefore,—

"on his crest
Sat horror, plumed."

The last of the American cases which we shall stop to consider is one of recent date, emanating from a court of high ability--the case of *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, A. D. 1868.

Fay v. Parker.

Among the head-notes are these : " While those damages which depend on the sound discretion of a jury are not susceptible of any accurate regulation by the court, yet the jury should be prevented, by proper caution, from acting upon improper theories as to the legitimate elements to be considered in estimating them.

"The term 'exemplary or vindictive damages' should not be used without such explanation as may prevent a jury from being misled by it. For voluntary wrongs, additional damages are allowed for injured feeling, which must naturally be aggravated or mitigated by the degree of malice actually existing, but nothing beyond the individual grievance should be taken into the account in estimating them."

And refreshing as a well-spring in a desert is the sensible talk of Mr. Justice CAMPBELL, expressing the opinion of the court: "It is in connection with the various degrees of blameworthiness chargeable on wrong-doers that the discussions have arisen on the subject of vindictive or exemplary damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent, while, according to others, the damages usually so called are only meant to recompense the sense of injury, which is, in human experience, always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term "exemplary" or "vindictive damages" has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead; and we think the only proper application of damages, beyond those to person, property, or reputation, is to make reparation for the injury to the feelings of the person injured. This is often the greatest wrong which can be inflicted, and injured pride or affection may, under some circumstances, justify very heavy damages. * * The injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances.

"It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is, to give what to ordinary apprehension of impartial men would seem proportionate to an injury which must be measured by the instincts of our common humanity."

This review of some of the more prominent cases touching the

deliberately and designedly installed as a doctrine of civil remedies. Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.

It germinated, as I have said, in the misconceptions and inadvertences which were born of righteous indignation, and a zealous eagerness to visit justice and punishment for wrong upon a convicted offender, by means of the first judicial process which might happen to bring his sins to light.

When Mr. Justice ABBOTT, in *Sears v. Lyons*, A. D. 1818, said the jury "might consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the act was done, whether for insult or injury," he spoke of the defendant's intention to insult the plaintiff. And, for practical purposes, it might be immaterial whether the jury were told that they might consider the defendant's intention to insult the plaintiff, or whether they were told that they might consider the injury to the plaintiff's feelings by the studied insult inflicted by the defendant. The injury to the plaintiff's feelings is the substance of the instruction in either form of language; and for such injury, compensatory damages may be given. The trouble and difficulty and embarrassment arise when such compensatory damages come to be understood and considered as punitive damages; whereas, in truth, they are no more punitive than the amount of actual compensation for the plaintiff's pecuniary loss, resulting from the destruction of his property. And yet this case of *Sears v. Lyons* is constantly cited as an authority for vindictive damages, when, in fact, it is neither more nor less than an authority for giving compensatory damages for an injury to the feelings.

Now I venture to say that a vast number of the cases (probably a majority of them) may be explained in the same way. Take the case referred to by Mr. Justice HEATH, in *Merest v. Harvey*, where the jury gave £500 for knocking a man's hat off.

If the defendant inadvertently knocked off the plaintiff's hat, or smashed it down over the plaintiff's face, his hat and his face were hurt just as much as if a low villain, or an irate member of parliament, had inflicted the injury by intentionally committing an

Fay v. Parker.

unprovoked and unjustifiable assault and battery; but in the former case the plaintiff's feelings (call them pride, vanity, sensibilities, delicacy, or what you please,) are damaged very little, if at all, whereas, in the latter case, a jury might properly give £5 for the injury to the plaintiff's person and property — that is, his face or his nose, and his hat — and perhaps £495, more or less, according to the aggravation of the circumstances, for the injury to his feelings.

Is it not quite natural that many people should regard the £495 as punitive instead of compensatory? And how natural it would be for that mistake to grow into law, so far as the law consists of authority and precedent! An injury to the feelings a thousand times greater than the mere pecuniary damages which accompanied or caused the injury to the feelings is a matter too refined, it may be feared, for popular comprehension (except, perhaps, in cases touching the honor of a woman); and therefore juries, and quite frequently judges, would understand they were giving punitive when they were really giving no more than compensatory damages.

I venture to affirm that the most patient research will be exhausted in vain in the effort to find the English case in which a judge ever deliberately and intentionally told a British jury, in any form of language, that they might give the plaintiff four kinds of damage, arithmetically arranged as follows:

1. Damage to the plaintiff's hat,	£1
2. Damage to his head and face,	5s.
3. Damage to his feelings,	£100
4. Punishment of the defendant by way of example, as a protection of the public by enforcement of criminal law in a civil case,	£300
Total amount of verdict.	<u>£401 5s.</u>

The truth is, this method of compensation is a modern and American invention, resulting from a misunderstanding of the loose and inaccurate forms of expression used in the old English cases.

The imposition of vindictive damage is, by some, supposed to have originated in actions of trespass *vi et armis*, slander, and seduction; which means, that they were first given as damages for mental pain. But "actual" damage, to use the very common word

employed in the cases, being habitually referred to things purely gross and material, an injury to any thing mental or spiritual was made good by exemplary damages, so called, which, in fact, were as purely compensatory as the damages given for injuries to material things, — both kinds of damages being compensatory, and nothing more.

If compensation were now understood, as it formerly was, to be made for injuries to material substance only, and exemplary damages were now understood, as they were formerly, to refer to injuries to the spiritual or mental part of the human nature, there would be no trouble or difficulty in the matter; but in progress of time these definitions have changed. Compensatory damages now include injuries to the mental and spiritual part of mankind; and this change of definition leaving nothing for “exemplary damages,” as formerly understood, to operate upon and be applied to, by a very natural mistake the term “exemplary” has been supposed to refer to criminal punishment for the sake of public example; an idea that was not included in “exemplary damages,” as formerly understood.

What are called exemplary damages may be given in assumpsit, as in the case of a breach of promise of marriage. *Baldy v. Stratton*, 11 Penn. St. 322. Why? Evidently because of the injury to the feelings, the disappointment, mortification, chagrin, loneliness, and mental suffering of many kinds, the aggregation of which, in the language of the law of England, is not an *actual* injury. A broken head is perceptible by the sight and touch, but a broken heart is quite incomprehensible. This English use of language is well enough, if everybody understands its meaning; but some people, misunderstanding it, have erroneously supposed that it meant the object of a civil suit was something more than compensation.

These general remarks apply just as well to a great many American cases emanating from courts of the highest ability and authority; cases so numerous, that an omission to refer to them cannot be regarded as invidious.

But, no matter how numerous the cases, nor how respectable or elevated the tribunals from which they emanate, if they enunciate a doctrine which was planted in, and has grown out of, blind misunderstanding, — a misconception that, so long as it is indulged, must inevitably be arrayed in opposition to sound principles of law, and the removal of which will leave the element of damage a plain,

clear, consistent, and symmetrical branch of the law, if this fact is recognized, admitted, and understood, the inquiry will be, not how great the array, nor how formidable the aspect, nor how venerable the antiquity of adverse adjudications, but, simply, how long (being finally convinced of our mistake) shall we go on with the infliction of double and treble punishments for a single offense; and how long shall we thus continue to trample on sacred rights, rooted and grounded in the maxims of the common law, and guaranteed by the constitution of our political government?

The case demands a more specific consideration of its aspect in respect of fundamental and constitutional law.

Nemo debet bis vexari pro una et eadem causa.

Nemo debet bis puniri pro uno delicto.

No person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. Art. V, Amendments to the Const. U. S.

No subject shall be liable to be tried, after an acquittal, for the same crime or offense. N. H. Bill of Rights, Art. XVI.

These maxims are as old as the common law; and these constitutional provisions are neither more nor less than a solemn recognition of them by the highest legislative authority.

Mr. Broom mentions but one "remarkable exception which formerly existed" to the principle stated and illustrated by these maxims.

This occurred in the proceedings in case of Appeal of Death (see 4 Bl. Com. 312), which might be instituted against a supposed offender after trial and acquittal, and by which punishment for some heinous crime was demanded on account of the particular injury suffered by an individual, rather than for the offense against the public; but this method of prosecution, having attracted the attention of the legislature in the celebrated case of *Ashford v. Thornton*, 1 B. & Ald. 405 (*qu. vide*), was abolished by Stat. 59, Geo. III, c. 46; Broom's Leg. Max. 258.

Blackstone tells us that this private process for the punishment of crimes probably had its origin in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous crimes — a custom derived by our British ancestors, in common with other northern nations, from the ancient Germans. Tacitus Man. Ger. c. 21.

These private prosecutions by appeal, so called, and which involved not only cases of homicide, but also of treason and felony, were gradually discontinued, or abolished by statute, though, to some extent, they were still recognized as legal remedies in the days of Blackstone. But they were plainly regarded by that eminent jurist as violative of the fundamental maxims of the law; for he says: "These appeals may be brought previous to any indictment, and if the appellee be acquitted thereon, he cannot be afterward indicted for the same offense." And, again: "If he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterward be appealed; for it is a maxim in law that '*nemo bis punitur pro eadem delicto*.'" 4 Bl. Com. 312-315.

In trespass the old process was a *capias*, and a fine was set in proportion to the degree of the offense, and levied by *capiatur*. Com. Dig., Action, G, 2. This practice, by which a fine to the king for a breach of the peace was recoverable in the same suit in which the plaintiff sought damages for his personal injury, was never adopted in this country. And by statute 5 & 6 Wm. III, c. 12, the practice was abolished in England, that statute having enacted that "*no capias pro fine* shall be prosecuted against the defendant, either in trover, ejectment, assault or imprisonment." *Lindsey v. Clarke*, 5 Mod. 285. See *Morrison v. Bedell*, 22 N. H. 234, 244.

Prior to the statute of Wm. III, it is believed no case can be found in which the suggestion of exemplary, punitive or vindictive damages, or any thing about smart money, is contained.

It is possible that the notion of punishing an offender by damages ultra compensation, in a civil suit, may have originated in an effort thus to evade the statute of Wm. III.

The provision of our federal constitution, that no man shall be twice put in jeopardy of life or limb, is by no means to receive such a construction as would permit a man to be twice tried for any offense other than such as is actually punishable by loss of life or limb. At the time of the adoption of the amendment which incorporates this provision, I suppose there was no State in the Union which prescribed any punishment of limb to guard against which the constitutional provision should have been intended. But the provision was no doubt adopted from ancient English statutes, in which the expression occurred—statutes in practical operation when such punishments were inflicted; for in times anterior to the

Fay v. Parker.

Norman conquest, most, if not all, felonies were punishable with death, unless redeemed by the *weregild*. 1 Hale's P. C. 12, note; and in the time of Wm. I and Wm. II, many felonies were punished by loss of limb. See argument of Emmett, in the *People v. Goodwin*, 18 Johns. 187, and cases there cited; but, per SPENCER, C. J., the expression *jeopardy of limb*, in the constitution, "was used in reference to the nature of the offense, and not to designate the punishment for an offense. Punishment by deprivation of limb would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted. We must understand the term 'jeopardy of limb' as referring to offenses which in former ages were punishable by dismemberment, and as intending to comprise the crimes denominated, in the law, felonies.

"The question then recurs, what is the meaning of the rule that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb? Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this: that *no man shall be twice tried for the same offense*."

In *Whitney v. Hitchcock*, 4 Den. 461, which was *trespass* for an indecent assault, the court remark: "The general question, what damages can be recovered by way of punishment in the class of actions where exemplary damages are usually given, is not involved here. It might be difficult to reconcile what has been said in the books with any definite principle, but we do not intend to express any opinion upon that subject in this case. The present suit is brought for the loss of the services of his servant, which the plaintiff says he has sustained in consequence of the injury which the defendant has inflicted upon her. This he is entitled to recover; and if sickness had followed, he could have claimed to be reimbursed for the expenses attending such sickness; but we all think he cannot recover beyond his actual loss. The young female can herself maintain an action in which her damages may be assessed; * * * and if the father could likewise recover them in this case they would be twice claimed in civil actions, and the defendant would also be liable to indictment."

In *Fox v. Ohio*, 5 How. 435, McLEAN, J., remarks: "There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offense."

This, it is true, applies to the respective governments; but its spirit applies with equal force to a double punishment for the same act by a State and the federal courts.

And Judge STORY says this constitutional prohibition is but a recognition of an old maxim of the common law, and therefore we are to resort to the common law to ascertain its true meaning. He also refers to another provision of the federal constitution: "No fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Art. 7 of the Amendments.

The only modes of making this re-examination known to the common law are by a writ of error and a new trial. *United States v. Gilbert*, 2 Sumn. C. C. 19, and see *Parsons v. Bedford*, 3 Pet. 433, 448.

In *U. S. v. Gilbert*, Judge STORY is treating of the application of the constitutional provision and of the common-law maxim to a capital case, which that was. He does not, however, indicate that there is any such restriction; and in *Com. v. Purchase*, 2 Pick. 521, at p. 523, PARKER, C. J., says: "There is no difference, in relation to this question, between felonies which are capital and those which are not. All felonies, whether capital or otherwise, are included in the provision" of the amendment to the constitution.

The learned author of "Legal Maxims" and the "Commentaries on the Common Law" recognizes the identity of these maxims, and the language of our United States constitution, when he says: "It is a principle designated by Lord CAMPBELL as a 'sacred maxim,' that *nemo bis vexari debet pro eadem causa* — no man ought to be twice tried or brought into jeopardy of his life or liberty more than once for the same offense." Broom's Com. 992. And Lord CAMPBELL, in *Reg. v. Bird*, 2 Denison's Cr. Cas. 222, remarks: "It is only the ignorant and the presumptuous who would propose that a man should be liable to be again accused, after a judgment regularly given pronouncing him to be innocent."

I presume no one will now contend that the constitutional provision against a second jeopardy is restricted to capital cases. Jeopardy of limb, if it has any technical meaning, can, at most, be applied to *restraint* of limb, i. e., deprivation of liberty; for, as we have seen, dismemberment could not have been contemplated, since such a punishment had not existed for ages before, at the

common law, except the loss of a hand for striking in the king's courts.

Putting a person on his trial for any offense, the result of the trial for which may subject him to a fine or recognizance, for default of the payment or procurement of which his liberty may be jeopardized, is putting him in jeopardy of limb, that is, of personal restraint, of imprisonment.

The word *jeopardy*, in its legal as well as etymological sense, means *danger* or *hazard*.

Therefore, to punish a defendant civilly, by fine, is to violate not only the constitutional immunity, and also the synonymous maxim of the common law, *nemo debet bis puniri*, but also the other maxim (also synonymous), *nemo debet bis vexari pro una et eadem causa*.

These maxims apply both to civil and criminal proceedings.

Said LUSH, J., in *Winsor v. The Queen*, Law Rep., 1 Q. B. 289, 325: "I think it is clear that there is no distinction between the two as to the applicability of the fundamental rule; whenever it applies, it applies to both. The rule can be illustrated or interpreted by referring to the plea which would raise the defense—the plea of *autrefois acquit*, or its converse in a criminal case, or a plea of judgment recovered, or its converse in a civil action. The meaning of the maxim *nemo debet bis vexari* is, that where the matter has been once litigated and brought to an end by the proceedings having gone on to a termination, the verdict or judgment shall be a bar to a second trial or litigation upon the same matter."

In the same case, BLACKBURN, J., said: "This rule of law means that a man shall not be vexed again for the same offense, after a previous decision upon it."

If, then, this constitutional prohibition of a double penalty is indeed nothing more than an affirmation of the general principle of the common law, applicable alike to civil and criminal cases, making a judgment in one action a bar to another action, founded on the same cause, it follows, logically, that punitive damages are a violation of the general principle of the common law as well as of the constitution, unless indeed they shall be subject to this important condition, that they cannot be given when a fine has been previously imposed in a criminal prosecution; and, when they have been given first in a civil suit, then a fine cannot be imposed for the same cause in a criminal prosecution. This would result in a

Fay v. Parker.

jurty's entire exemption from such satisfaction as is supposed to be due to the violated peace and dignity of the State in the latter case, and in both cases would seem inevitably to lead to a development in the art and a procedure in the practice of pleading, which, while amusing for its novelty, illustrates to minds regardful of legal simplicity, symmetry and correctness, the absurdity of the confusion of the doctrine.

Whoever heard, or expects to hear, or hopes to hear of a plea of *autrefois acquit* or *autrefois convict* in answer to a civil suit? or the plea of judgment in a civil suit, in abatement of an indictment for crime?

The provision against a double jeopardy is not incorporated into the constitution of New Hampshire, as it is in the fundamental law of many States of the Union. Why not? Because, in the first place, the provision of our bill of rights is equivalent; secondly, because the maxim of the common law is recognized, independently of any constitutional or statutory provision, as lying at the very foundation of human rights and privileges—a law of nature, and of obvious common sense and common justice.

So, also, the provision, expressly declared in the constitution of some States, that private property shall not be taken for public use without compensation, is not to be found in our constitution, but it is supplied by construction; for, said RICHARDSON, C. J., in *Bristol v. New Chester*, 3 N. H. 535, "natural justice speaks on this point, where our constitution is silent." See Sedgwick on Statutory and Constitutional Law, 494.

The constitutional right is merely a re-enactment or affirmation of the common-law right (probably regarded in England a constitutional right), enforced by plea of *autrefois acquit*, or *autrefois convict*, in bar of a suit in a criminal case, and by plea in abatement of the pendency of a former suit in a civil case. Its adoption in the constitution of the United States is evidence of what the common law was. 1 Whart. Cr. Law, § 573 (6th ed.); *The King v. Mawbry*, 6 Term, 638; *The King v. Sutton*, 5 B. & Ad. 52; *Com. v. Anthes*, 5 Gray, 207, 221, 230; 1 Bennett & Heard's L. O. C. (2d ed.) 440, 482, 513, 554, 592, 612; 6 Com. Dig., Pleader, R. 17; 1 Saund. Pl. & Ev. 21; 2 Hale's P. C., ch. 31, 32; 3 Waterman's Arch. Cr. Pl. & Pr. 111–123; Cooley's Const. Lim. 321; *Latham v. The Queen*, 5 Best & Smith, 641; *Parker v. Colcord*, 2 N. H. 36; *Bennett v. Chase*, 21 id. 581, 584; *Gamsby v. Ray*, 52 id. 513.

Fay v. Parker.

The origin of the provision in our bill of rights, that no person shall be liable to be tried after an acquittal for the same crime or offense, is in the fundamental liberties and constitutional rights of Englishmen; and in New Hampshire it is, said PARKER, C. J., in *Pierce v. The State*, 13 N. H. 567, "by reason of the constitutional provision that no person shall be tried twice for the same offense."

What, then, is all this immense accumulation of common-law learning and judicial decisions, on the matter of pleas in abatement of former action pending, and pleas in bar of *autrefois acquit*, or *autrefois convict*, but an application of the principle of the English common law, as recognized and guaranteed by our bill of rights?

The authorities to which we have referred, in the discussion of this branch of the case, are conclusive to the effect that — whether by virtue of the federal constitution, our own bill of rights, or the fundamental maxims of the common law — the "sacred maxims" whereon, as on a rock, our liberties are planted — this privilege is secured to every American citizen, as firmly as the inalienable rights of life, liberty, or the pursuit of happiness, namely: he shall not be liable to be tried after an acquittal; nor twice punished; nor twice put in jeopardy for the same offense.

Just as firmly is the right secured to him, that in all cases wherein he is charged with conduct such as calls for punishment for the sake of public vengeance or public example (and to him it can make no difference, so long as the blow must fall, whether it comes from the arm of the civil or the criminal law), that he shall be permitted to confront his accusers and their witnesses face to face, and not be tried upon depositions, and that he shall go free unless his guilt is proven beyond a reasonable doubt.

These prerogatives our fathers brought with them from Old England, and when they became independent and free, they did not omit to record them on the magna charta of their new liberties.

How shall these fundamental principles and rights be maintained, and this immunity from a double or a treble punishment for the same offense and from unconstitutional modes of trial secured in cases like the present?

This defendant has committed an assault, to the damage of the plaintiffs. For the injury thus inflicted the defendant must make full reparation to the plaintiffs. He has also, by the same act, broken the public peace. For this he must atone to the criminal law. Now, this is all right and fair. The injured party will thus

be fully compensated; the majesty of the State will be vindicated; the wrong-doer will receive his punishment; the public will be admonished by the example.

But the defendant shall not be *twice* punished. If he is made to pay a fine (denominated exemplary, punitory, or vindictive damages, or smart money), besides another sum of money, required of him as damages for the injury sustained by the plaintiff, if he is made to pay this aggregate of damages and punishment *to the plaintiffs*, he has been just as much punished as if he had paid to the State the fine, and to the plaintiffs only that which belongs to them — compensation for their injuries. The punishment is the same to the offender, neither more nor less; the smart is neither more nor less sharp, whether the punishment inures to the benefit of an individual or of the public.

If, then, he has paid to the plaintiffs, both compensatory damages and a fine by way of punishment, called exemplary damages, and he shall afterward be indicted for the same offense, how shall he escape a double punishment?

Suppose he had been indicted prior to the bringing of this action, had been convicted, and paid his fine to the State: if the instructions to the jury in this case are sustained, how shall he escape a double punishment?

The test by which to decide whether a person has been once tried is familiar to every lawyer. It is a test by the ordeal of pleading. In a criminal prosecution, it can only be applied by a plea of *autrefois convict*, or a plea of *autrefois acquit*. *The People v. Goodwin*, before cited. In a civil prosecution, it can only be a plea of former recovery in bar, or by a plea of another action pending, in abatement. These pleadings, these tests, are all parts of the common-law right, guaranteed by the constitution, that a man shall not be twice punished for the same offense.

But no plea of *autrefois convict*, or its converse, can be pleaded in bar of a civil suit; nor can a plea of former judgment be received in abatement of an indictment.

I am aware of but one case in the annals of American jurisprudence (*Pendleton v. Davis*, 1 Jones, 98), in which this test of pleading has been entirely disregarded, and the principle distinctly recognized and solemnly declared that a man may be punished *three times* for the same offense. To this eminently distinguished case further reference will be made hereafter.

Pay v. Parker.

Now, if the present case is within the principle or the bill of rights, or if, independent of that provision, the fundamental maxims of the common law are to be recognized in this State, there is only one course of procedure that can be adopted; that course is plain, straight, logical, lawful, and constitutional. Since the State cannot be defeated on an indictment by plea of a judgment recovered by these plaintiffs, the only method of enforcing the principle is to refuse in this suit to impose a fine as a penalty for the crime; which fine the plaintiffs are not entitled to, which they do not ask for in their writ, and which may have been, or may hereafter be, imposed in a prosecution by indictment for the same offense.

Almost innumerable practical difficulties must be encountered, involving absurdities disgraceful to the administration of the science of law, destructive of the established rules of pleading, and in utter contempt of constitutional rights and time-honored principles of justice in the attempt to evade, conceal, or harmonize the incongruities resulting from an effort to recover damages in a civil action for tort, beyond and distinct from compensation to the fullest extent for all the injury which a plaintiff has sustained.

Every principle and rule of pleading is violated, to begin with. In the first place, the plaintiff is awarded what he does not ask for in his writ. In the next place, the defendant is forbidden to aver, by any pleadings, that he has once paid, or been absolved from the payment, to the State, of that which the plaintiff has received without asking for it. In the third place, the defendant is not only placed in jeopardy of a double punishment for the same offense, but is punished criminally in a civil suit, upon a declaration neither sworn to nor presented by the grand jury.

Then, again, as we have seen, the elementary rules of evidence are disregarded or completely demolished. The defendant may be compelled, in the civil suit, to testify against himself, in a case in which, upon his own testimony, he may be punished as a criminal.

He may have depositions read against him, and thus be deprived of his constitutional right to meet the witnesses face to face.

He may be convicted of, and punished for, a criminal offense upon the mere balance of evidence, although the jury may entertain a reasonable doubt of his guilt.

Again, the constitutional right of exemption from punishment, after a pardon by the executive, is violated by the imposition of

Fay v. Parker.

punitive damages. The pardoning power being a constitutional power (N. H. Const., art. LII), the exemption of the pardoned criminal is a constitutional exemption. But, by the imposition of a fine in a civil action, the executive pardon and remission of the fine is ignored.

Suppose this defendant shall hereafter be indicted for the offense which is the subject of this suit ; of what avail will it be that he shall plead a judgment, rendered on this verdict, for exemplary damages ?

Suppose, in this case, as to the plaintiff's claim for damages, he had pleaded, as to any damages beyond compensation for the injury to the plaintiffs, a former acquittal or conviction on an indictment, and sentence performed by imprisonment, or a pardon for the offense, and not guilty as to the residue, as, under the authority of 11 Pick. 134, he might ; in such a case could this verdict stand ?

Suppose, in this case, there shall be judgment rendered on the verdict for the full amount, and being in jail on execution, the defendant shall pay the amount of the special sum awarded by the jury for actual damages, and all the costs, and shall then receive a pardon from the governor and council, and bring *habeas corpus* ; what then ?

These questions are very easily propounded ; but how to deal with them when they become actual and not abstract propositions, is a matter, I apprehend, of some difficulty.

But another question, I fear, is quite too formidable for solution, namely, where shall be the limit to the confusion and absurdity involved in the attempt to reconcile the doctrine of vindictive and punitive damages, in a civil suit, with the sense, the reason, the logic, the symmetry of the science of jurisprudence ? and what power can avail to stay the utter demolition of the constitutional safeguards placed around the people to protect them from the arbitrary despotism which would impose upon them cruel, unjust, and oppressively accumulated punishments ?

A few and only a few of the difficulties and practical absurdities, to which allusion has been made as resulting, or liable to result from the enforcement of this doctrine for which the plaintiffs contend, are indicated by PERLEY, C. J., in the case somewhat analogous to the present, of *Morrison v. Bedell*, 22 N. H. 234, in which the plaintiff undertook, in an action of trespass, to recover the statutory penalty for cutting trees. Said PERLEY, C. J.: "The form of

Fay v. Parker.

action is suited to the nature of the claim. * * Debt is the proper remedy to recover a forfeiture, though the wrongful act be forcible in its character and a trespass at common law. * * It might, doubtless, sometimes suit the views of a plaintiff to sue, and in the same action include a claim for these forfeitures. In that way, he might, perhaps, try his chance for a large amount in the shape of statutory penalty, without increasing his risk in the prosecution of his demand for the actual damages he had sustained. But the inconvenience and embarrassment of the defendant would be at least in equal proportion. He would be compelled to defend himself in the same suit against two separate charges for the same act, and these charges different in their natures, and followed by far different consequences; and, besides, the statute provides in the demand for the forfeiture a special mode of trial by proof not admissible in the other charge. The two claims are founded on the same wrongful act. How can they be conveniently or fairly tried together, when the evidence, which the statute has made competent to charge the defendant with the forfeiture, is incompetent and illegal on general principles to prove the same act in the other cause of action. * * Some of the inconveniences that would attend the trial of a claim for these penalties in the same suit, with a demand at common law, would be, one demand would be of a civil and the other of a criminal nature. The statute provides for a peculiar mode of trial in a suit for the penalty, and allows evidence which would be incompetent in a trial of the other demand; the limitation of the two causes of action is different, which, to be sure, is not of itself decisive, but tends still further to complicate the case. And the judgment would also be of different effect," etc.

We have the high authority of Comyn's Digest for the general rule, that an action on a statute cannot be joined with a suit at common law. Now, suppose the legislature should enact a law, that actions on statutes might be joined with a suit at common law, and that a claim to recover a statutory penalty might be joined with a count in trespass, or recovered in such an action without joining it or asking for it, the inconveniences, embarrassments, and absurdities suggested by Judge PERLEY would soon become intolerable; and yet, such a law, probably, would not be unconstitutional. But suppose the legislature should, by a general law, abolish the doctrine of former acquittal and former conviction, and

enact in terms that a man may be twice put in jeopardy for the same offense, or as often as a grand jury may find a bill, or a complainant swear to a complaint, and that a man may be repeatedly vexed for the same cause, and twice or thrice punished for the same fault; would such an act, the practical operation of which is illustrated by the proceedings in the case before us, be deemed constitutional?

Probably not; but its invalidity would not result from express constitutional prohibition, any more than the undoubted invalidity of a law prescribing that private property may be taken for public use without compensation to the owner.

No condition is imposed upon the right of eminent domain by our State constitution; but, nevertheless, the right to compensation for property taken under such authority is secured to the citizen by the principles of natural justice, which, it is said, is ever "the universal common law of mankind." Potter's Dwarries on Statutes, 371; Cooley's Const. Lim. 559; *Bristol v. New Chester*, 3 N. H. 535.

The truth is, this fundamental view has been overlooked in a vast majority of the cases in which the doctrine of exemplary damages has been declared; and, if the view is sound, the precedents are not; but every adjudged case to which the constitutional objection is applicable, and in which it has been overlooked or disregarded, involves its own elements of self-annihilation, and has no vital authority.

In several instances, courts in England and America, oppressed by a sense of the injustice and wrong resulting from double punishment for a single offense, have endeavored to point out a means of doing substantial or comparative justice, by seeking to apportion the fine and punishment which the offender has incurred, between the individual personally injured and the public; thus, as the popular phrase is, "blending together the interests of society and the individual." It must be quite difficult to *talk* rationally or logically in this direction; but to apply the test of practical experiment, *hic opus, hoc labor est*.

Here is an example of this kind of talk: One Davis having assaulted Mr. Pendleton in the court-house, and in the presence of the court, Mr. Pendleton sued Mr. Davis for the trespass, and recovered a verdict for "\$100 *actual* and \$1,000 *exemplary damages*." On motion to set aside the verdict, it was urged that the circum-

Fay v. Parker.

stance that the blow was given in the presence of the court should not have been left to the jury, because the defendant was liable to be fined for that as a contempt; and it was said, if the jury could take that into consideration he would be punished twice for the same thing.

But, *per curiam*, "upon the same ground it might be insisted that a jury could not give exemplary damages when the defendant was liable to an indictment; yet it is well-settled law, that a jury may give exemplary damages in such cases.

"No doubt the court, in imposing the fine, would take into consideration the fact that exemplary damages had been recovered." *Pendleton v. Davis*, 1 Jones, 98.

"No doubt" this is all sheer nonsense. No doubt Davis deserves punishment; and he is liable and quite likely to obtain his full deserts in the shape of *three* punishments for the same offense.

Pendleton v. Davis is bad enough as we have it, but it might have been worse; and the next case of the same kind is quite likely to be, namely, of this character: instead of rendering a divided verdict, the jury find for the plaintiff the round sum of \$1,000 damages, which Mr. Davis pays.

But, ever before suit brought against him, and on the instant occasion of the assault, the court fined Davis \$50 for contempt, which he paid. When the court imposed that fine, did they take into consideration the fact that a suit for an assault, with a claim for exemplary damages, was impending?

When the jury awarded \$1,000 to the plaintiff, how much of that sum was exemplary and punitive, how much compensatory damage? How does anybody know? How is anybody to find out?

Did the jury consider that the defendant had paid a fine of \$50 to the county, and so award the plaintiff \$50 less on that account? Who can tell, or how can any one tell?

Did the jury *know* that Davis had been fined for the contempt? How did they find that out? Did the court *at nisi prius* entertain the plea of *autrefois convict* for the contempt, or was the fact in some way disclosed by the evidence?

Now, when Mr. Davis has satisfied the plaintiff's execution, no doubt he has been punished twice, very fully and without apportionment.

And, in the fullness of time, Mr. Davis is indicted by the grand

jury for this same offense. Will the court in North Carolina permit him to plead Mr. Pendleton's judgment in bar? Probably not, even if it could have been averred what proportion of the gross sum had been awarded for punishment and how much for compensation. Will the court take judicial notice that there ever was any civil suit against the defendant growing out of this matter? Will they receive evidence of the fact?

Suppose the maximum penalty for the offense at criminal law is a fine of \$100, and the court in *some way* find out that Mr. Pendleton has recovered \$1,000, a portion of which is for punitive damages; how are they to know whether the jury awarded \$100, or \$500, or \$5, as exemplary damages? If they do not know, and cannot find out, "no doubt the court, in imposing the fine," will fail of accomplishing any very useful result by "taking into consideration the fact that exemplary damages have been recovered."

And finally, Mr. Davis graduates from this school of adversity a sadder and wiser man, no doubt, but in the same condition of mind with which he entered upon his experience of "unmerciful disaster" — still harboring contempt of court.

When it is asserted, as it has been, that "the true principle is that judgments in both the civil and criminal courts should operate as mutual checks upon each other, thereby increasing or diminishing the punishment in either suit," it is said much too hastily; and if only a little more reflection and consideration had been given the matter, it would not have been said at all. See *Am. Law Rev.* for Jan., 1873, pp. 366-368. Such a theory is altogether too fanciful, visionary and impracticable.

The very recent case of *Wells v. Abrahams*, L. R., 7 Q. B. 554, is an admirable illustration of this. It was an action of trover and trespass for a brooch. Verdict for the plaintiff. A rule for a new trial having been obtained on the ground that it appeared from the evidence that the brooch was taken by the defendant, in such circumstances as to prove a charge of felony, and that the judge ought, therefore, to have nonsuited the plaintiff, it was held that the judge was bound to try the issues upon the record, and that he was right in not having nonsuited the plaintiff.

But, pending the contention, the defendant produced an affidavit, showing that since the verdict the plaintiff had instituted criminal proceedings against the defendant for the larceny of the

Fay v. Parker.

brooch ; and this fact created great embarrassment, as will be seen from the elaborate arguments and several opinions of the court, as reported.

It seemed to be conceded that the plaintiff *ought not* to have maintained his civil action, if he was contemplating further proceedings under the criminal law — but he had done it ; the defendant had not moved for a nonsuit, the plaintiff had gotten his verdict, and now the defendant proposed to show that, because he was a thief, and liable to be punished as such, therefore the plaintiff ought not to have had such a judgment against him.

LUSH, J., said that in *Lutterell v. Regnoll*, 1 Mod. 282, it had been expressly decided that a defendant could not, by way of plea, set up his own turpitude, and say that he had been guilty of a felony in answer to an action for trespass.

And the Lord Chief Justice was well-nigh overwhelmed with the novelty and difficulty of the situation, saying : “ No doubt it has been long established as the law of England, that, where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But, although that is the rule, *it becomes a different question when we have to consider how it is to be enforced.*”

“ It may be that the person against whom a prosecution for felony is pending may have a right in an action to show by plea that he is in the position of a felon, and so he may be able to stop the action brought by the person injured by his felonious act, although I think this is open to doubt, because the effect would be to allow a party to set up his own criminality. But it may very well be that, if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of this court might be invoked to stay the proceedings, which would involve an undue use, probably an abuse, of the process of this court, in which case the court is always willing to interfere to prevent such abuse. It may be — I do not say it is so — that, if a person, neglecting his duty to prosecute for an offense committed against him, were to bring an action instead of prosecuting, the court might be called upon to intervene, and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought ; but it

is unnecessary now to consider in what way this rule of law might be enforced."

BLACKBURN, LUSH and QUAIN, JJ., severally encountered and grappled with the difficulty, but after long struggle and contention, the conclusion of their discussion culminated in such despairing declarations as : "I am not prepared to say so and so ;" "I cannot find any case to this effect ;" "I do not see how a plaintiff can be prevented from trying his action ;" "I know of no instance in which the court has interfered, but I apprehend it might do so ;" "I do not very clearly see" this or that ; "I am at a loss to find any case" similar ; "I do not see how the judge at *nisi prius* could stay proceedings," etc., etc., etc.

And so, at last accounts, the court of Queen's Bench was still sitting hopelessly involved in the meshes of what Mr. Justice QUAIN declared to be "utterly inconsistent positions."

Now, why all this unnecessary trouble, confusion, and perplexity when the course of procedure should be plain, straight, and uninterrupted ? The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment, namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed, and who has suffered injury, go to the civil courts and there obtain full and ample reparation and compensation ; but let him not thus obtain the "fruits" to which he is not entitled, and which belong to others.

Why longer tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court ? deprives him of the right to meet the witnesses against him face to face ? deprives him of the right of not being compelled to testify against himself ? deprives him of the right of being acquitted, unless the proof of his offense is established beyond all reasonable doubt ? deprives him of the right of not being punished twice for the same offense ?

Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law ? The sole object, in its practical results, seems to be, to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff required

Aldrich v. Wright.

the destruction of the constitution, there would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guarantees of that instrument, and explode the very foundation upon which the constitutional guarantees are based, for no other purpose than to perpetuate false theories and develop unwholesome fruits?

Undoubtedly this pernicious doctrine "has become so fixed in the law," to repeat the language of Mr. Justice CAMPBELL of Michigan, "that it may be *difficult* to get rid of it." But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly.

It was once said, "if thy right eye offend thee, pluck it out; * * and if thy right hand offend thee, cut it off." Wherefore, not reluctantly should we apply the knife to the deformity, concerning which every true member of the sound and healthy body of the law may well exclaim, "I have no need of thee."

As to so much of the verdict as relates to the exemplary or vindictive damages, it must be set aside, and there must be

Judgment on the verdict for no more than \$150.

ALDRICH V. WRIGHT.

(88 N. H. 203.)

Defence of property — right to kill animals. Damage feasant.

A statute provided that no person should, in any way, destroy any mink between certain dates, under a penalty prescribed. The constitution declared that "all men have certain natural, essential and inherent rights," among which was included the right of "protecting property." In an action to recover such penalty, it was proved that defendant shot the minks upon his own land while they were chasing his geese. *Held*, a good justification without showing that the geese were in imminent danger and could not otherwise have been protected.

The law relating to the defense of person and property considered.

Cases relating to the killing of animals trespassing or damage feasant collected.

ACTION of debt to recover the penalties prescribed by statute for killing minks. The provisions of the statute are given in the opinion.

The only evidence was that of one Blood whose premises were separated from defendant's by a brook running into a small pond owned by them in common. He testified as follows: "I stood in my door-yard; heard the geese [in the aforesaid pond] cackling; I saw the four minks swimming toward the geese; some of the geese had then got on to the shore of the pond, and some of them were in the water; the minks were from one to three rods distant from the geese. As soon as the minks saw me they stopped pursuing the geese and ran out upon a little island, and there stopped. At the same time that I came out the defendant also came out with his gun. He fired at the minks on the island, killing them all at one shot; the minks were all on the island when he fired; the defendant carried the minks off to his house; the geese were six old ones and eight young ones; geese had run in the pond two or three summers; never knew of any mink chasing any geese there before or since; don't know whether minks are accustomed to kill geese or not."

A verdict was taken by consent for plaintiff, subject to defendant's exception to a *pro forma* ruling that the defendant would not be justified in killing the minks if the geese were not in imminent danger, and could have been protected either by driving away the geese, or frightening or driving off the minks.

Ray, Drew & Haywood, for defendant.

G. A. Bingham and Aldrich, for plaintiff.

DOM, J.* "All men have certain natural, essential and inherent rights, among which are the enjoying and defending life and liberty, acquiring, possessing and protecting property." Bill of Rights, art. 2. In this declaration of the right of defending life and liberty, and protecting property, the Bill of Rights, more properly called the Declaration of Rights, professes to set forth a mere recognition of a natural right. The right thus recognized is maintained by the elementary principles of the common law, which are, in gen-

* LADD, J., having been of counsel, did not sit.

Aldrich v. Wright.

eral, adopted by the ninetieth article of the constitution, subject to legislative alteration and repeal; as a fundamental and essential right, the defense of life, liberty and property is here put, by a special guaranty, above the altering and repealing power of the legislature.

The statute on which this suit is brought provides that "No person shall in any way destroy, between the first day of May and the fifteenth day of October of each year, any mink, beaver, sable, otter, fisher or muskrat, under a penalty of \$10 for each animal so destroyed." Gen. Stat., ch. 251, § 2. The plaintiff's construction of this statute, presented in the *pro forma* ruling, admits the defendant's right of defending his geese, notwithstanding there is no clause in the statute expressly excepting and saving the right. As the legislature could not abolish the right, they are not presumed to have attempted an impossibility, or to have intended to pass a void act; and the statute is held valid by giving it a construction compatible with the constitution, making it applicable only to those cases to which it can be constitutionally applied. Between May 1 and October 15, the defendant could not lawfully kill these minks for their fur, or in sport or wantonness, or for any past pursuit or disturbance of his property, however vexatious, or for any other mischief committed, however serious; but he could lawfully protect his property against them between May 1 and October 15, as well as at any other time. If they had consumed his entire stock of poultry, he could not have justified his shot for obtaining their skins as the only available redress for their depredations; but, while one of his birds remained, he could lawfully defend it. He could have no indemnity for the past, but he was entitled to security for the future. Much as the statute had abridged his rights of hunting and reprisal, it had put him under no obligation to suffer the minks to eat, injure or annoy his domestic fowls. His natural, common-law and constitutional right of defense existed in full force and vigor, not repealed, nor in the slightest degree impaired or modified by the statute. He could exercise that right as fully and freely as if the statute had not been enacted. What was that right? This is the only question in the case.

Higher and earlier in its origin than the constitution or the common law, not superseded by those temporal and finite systems, but sustained and enforced by their declaration and sanction of the highest, primary, eternal and infinite law of nature (3 Bl. Com.

4; 1 Hale's P. O. [Am. ed. of 1847] 479, note 1), the right of defense cannot be prescribed within the limits of a narrow technical rule. It is an original and comprehensive prerogative, necessarily ascertained and defined by natural reason. It is not established by any fallible authority, nor measured by any precedent, nor restricted by any arbitrary dogma. Long upheld by the common law, it has, under the administration of that law, theoretically been what it was before; and now, reinforced by a constitutional guaranty, it is what it has always been. The authorities of the common law show what it has been held to be by men whose opinions are entitled to great consideration. If any discrepancy should be found in the definitions of it, given by common-law precedent and by natural reason, the latter must prevail, because the right is explicitly asserted in the bill of rights as a natural right, and not as one defined by common-law authorities. But between the natural right and its common-law definition rightly understood there is no variance that concerns the present inquiry. In the general terms of its common-law definition, the right of defense is the right to do whatever apparently is reasonably necessary to be done in defense. And the verdict in this case, taken by consent upon the doctrine asserted by the plaintiff, subject to exception, must be set aside, because that doctrine conflicts, in three particulars, with the right of defense.

I. The first error is limiting the right of defense by the bounds of real instead of apparent danger.

If A aims a pistol at B with threats which induce B to reasonably apprehend that the pistol is loaded, and that A intends to shoot him, B may disarm A at once, although it turns out that the pistol is not loaded, and that A intends only a harmless jest. A is estopped to deny that the fact is what his conduct induces B reasonably to believe and reasonably to act upon. B is not obliged to wait for the question of actual danger to be solved by an experiment which seems likely to destroy his right of defense. And if, in the use of reasonably necessary means to avoid the apparent danger, he kills A, one ground on which his innocence may rest is, the reason of the doctrine of estoppel. By putting him in apparent peril, A invites him to defend himself; and A cannot put him in actual peril of capital punishment by inducing him to accept the invitation.

In this case the question is, not of the real danger merely, but

also of the danger, on reasonable grounds, really believed by the defendant to exist. He might have entertained, and had good cause to entertain, erroneous ideas of the character of the minks. Their pursuit of the geese, some of whom were young, was a seeming threat, and an overt act calculated to excite a suspicion of hostile designs, and ability to execute them. The evidence against them tended to show what, in a human creature, would be the ordinary symptoms of a felonious spirit, regardless of social duty and fatally bent on mischief. And if they never did and never could kill a goose of any age, their reputation might be bad; and their reputed character was one of the circumstances of apparent danger or apparent safety. A person attacked has no right to kill his assailant for the purpose of punishing a bad or desperate man, or of ridding the world of a ruffian (4 Bl. Com. 178, 184); but the character of the assailant for ferocity, or peaceableness, known to the party attacked, is circumstantial evidence of apparent peril or apparent security, upon which he may be authorized to act. An attack upon a dangerous man may be unjustifiable; but the dangerous character of an assailant is a legitimate reason for apprehending danger, and employing speedy, energetic and sure means of defense. *Harrison v. Harrison*, 43 Vt. 417; Wharton's Cr. L., §§ 641, 1026, 1027. See *Bohannon v. Commonwealth*, 8 Am. Rep. 474. The numerous authorities, in other jurisdictions, holding a different doctrine are not consistent with the natural right of defense declared in our bill of rights.

The reputation of the minks, their pursuit of the geese, and the alarm and retreat of the latter, may have shown apparent danger, when the real character of the pursuers may have created no actual danger. Mr. Blood, a near neighbor of the defendant, did not know whether minks are accustomed to kill geese or not. The defendant may have been equally uninstructed. And it was not his duty to postpone the defense of his property until, neglecting his usual occupations and incurring expense, he could examine zoölogical authorities, consult experts, or take the opinion of the county, on the question whether his "half-grown" geese were actually endangered, in life or limb, by the incursion of "one old mink and three young ones," "all about the same size." The conclusion of the investigation might be too late. And if the question were found to be a debatable and doubtful one, it would not be his duty to settle it by a trial at his own risk. The plaintiff's doctrine

destroys the right of defense which exists in a case of merely apparent danger.

II. The plaintiff's claim that the defendant is liable if the geese were not in imminent danger, taken in the sense for which the plaintiff contends, and the sense in which both parties, at the trial, probably understood it, cannot be sustained.

The term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement; and, in its broad and popular signification, admitting a large degree of latitude and adaptation to circumstances, it may be properly used in this case. But it has been so much used in cases of defense against a human aggressor, and, in that class of cases, has, for peculiar reasons, acquired a legal meaning so special, restricted and technical, that, if used in a case like the present, it should be accompanied by some explanation of the general comparative and relative sense in which it is used.

The reserved case states that Mr. Blood, in common with the defendant, owned the pond. Taking that to be the condition of the title, the defendant's rights, so far as they are involved in this case, were the same as if he alone had owned the pond including the island. But supposing, what the case undoubtedly means, that the boundary line, between the lands of Mr. Blood and the defendant, ran through the pond, as well as through the middle of the brook that flowed into the pond, the minks and the geese may have been on premises of which the defendant was sole and absolute proprietor. But it is immaterial how that is, because the defendant was evidently in the actual and legal use and occupation of his own part of the pond in his own right, and of the rest of it by the license of Mr. Blood. It is not claimed that the defendant, as a trespasser, killed the minks on Mr. Blood's land without his consent. This is not trespass *quare clausum* brought by Mr. Blood against the defendant. For the legal purposes of this case, as between the defendant and the minks, the pond and island were the pond and island of the defendant; his geese were rightfully there, and the minks were there without right. And there was something to be done; for there was no duty of living with or yielding to intruders who manifested a propensity to eat their co-tenants.

Defensive force, in its kind, degree, and promptness, is measured by the consequence of using it, and the consequence of not using it; it should be proportioned to the apparent danger, viewed in the

Aldrich v. Wright

light of those consequences contrasted with each other. When force, purely defensive at first, increases and becomes more than is reasonably necessary for defense, the excess is aggressive and not defensive. When resistance starts beyond the reasonable necessity of the case, it may be devisable into two parts; so far as it is not reasonably necessary, it is resistance; so far as it is reasonably necessary, it is aggression. But this is to be understood in the liberal sense of the law. When it is reasonably necessary for A to shoot B, who is about to shoot him, A's shot is, in form, aggressive; but in substance and contemplation of law, it is defensive. In the present case, the defendant's act was defensive, if apparently it was reasonably necessary in quality, quantity, and time for the protection of his geese; and it was not defensive, if apparently and really it was not reasonably necessary.

To justify the defensive destruction of human life, the danger must be, not problematical and remote, but evident and immediate. If a man, after pursuing the defendant, as the minks pursued his geese, had retreated to the island, with no means of doing harm while he remained there, and there had been no reasonable ground to believe he would make an immediate attack, the time would not have been a reasonably necessary one for shooting him. The defendant would not have been in imminent danger in a technical sense of the authorities, which hold that a man's life is never in imminent danger of a human assault, so long as he can safely run away. But imminent danger is relative, and not absolute, and is measured more by the nature of consequences than by the lapse of time. It is not a condition of things in which the party, whose person or property is imperiled, is allowed to anticipate, and prevent the impending mischief by making a deadly defense only a precise and invariable number of seconds, minutes, hours, or days, before the mischief would happen without such defense. The law does not fix the distance of time between the justifiable defense and the mischief, for all cases, by the clock or the calendar. The chronological part of the doctrine of defense, like the rest of it, is a matter of reasonableness; and reasonableness depends upon circumstances.

In defense, it may be reasonable that a man should strike quicker for human life than for property; that he should strike quicker at an habitual fighter, professional robber, or notorious assassin, from whom there would be reason to expect sudden or extreme violence,

than at a man previously inoffensive, from whom there would be little reason to apprehend a serious attack; that he should strike quicker at a strong man than at a weak one; that he should shoot a dog quicker than he should shoot a man; and that he should shoot mischievous wild animals, which are the absolute property of nobody, quicker than he should shoot a valuable domestic animal, the property of his neighbor. The consequences of shooting, compared with the consequences of not shooting, are material to be considered on the question when he should shoot, as well as on the question whether shooting is a defense of a reasonably necessary kind.

Imminence of danger, in this broad and relative sense, creating a reasonable necessity, was the test of the defendant's right. But this test, by its frequent application to the defensive right of destroying human life, is so liable to be misunderstood, when applied to the defensive right of destroying mischievous wild animals, that some explanation of it is necessary in a trial of this case. It is probable that the parties understood that, by the doctrine of imminent danger, the defendant was liable unless the geese would, in a few moments, have been killed by the minks but for the defendant's shot. The doctrine, asserted in that form, would be erroneous. It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character, whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their fate, the sufficiency and practicability of other kinds of defense, considering all the material elements of the question, — it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese, continuing to resort as usual to the pond, apparently would have been killed by these minks within a period quite indefinite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property.

The right of defense is the right to do whatever apparently is reasonably necessary to be done in defense under the circumstances of the case. The English practice, of the judge advising the jury on the facts and weight of the evidence (*State v. Pike*, 49 N. H.

Aldrich v. Wright.

416, 417, 436; S. C., 6 Am. Rep. 533; *State v. Hodge*, 50 N. H. 520; *Greenwood's case*, cited in *White v. Wilson*, 13 Ves. 89; 1 Hale's P. C. 570; *Bradford v. S. C. R. Co.*, 7 Rich. 201; *Matthews v. Beach*, 5 Sandf. 256, 266), and drawing, from circumstances stated in special verdicts, conclusions which have often been matters of fact (1 Hale's P. C. 478; *Cook's case*, Cro. Car. 537; East's P. O., ch. 5, § 47; 1 Bishop's Cr. L., § 847, 5th ed.), and the general tendency of English courts to encroach upon the province of the jury, have carried into the reports many opinions of what is, and what is not, reasonably necessary, which are opinions of fact and not of law; and authors of legal treatises have naturally followed the judicial precedent, and expressed opinions of a like character. Nearly, if not quite all the doubt, obscurity, and conflict supposed to exist in the common law of defense, exist not in the law, but in these opinions of fact mistaken for opinions of law. When it is held that evidence tending to show a certain kind, degree, and imminence of danger did or did not justify a certain kind, degree, and celerity of violence in warding off the danger, the decision is a comparison of the probable consequences of using the violence, with the probable consequences of not using it, and an inference of fact drawn from the comparison, that the violence was or was not commensurate with the danger, and, consequently, that the violence was or was not reasonably necessary.

On the subject of defending a man's property, in his absence, by spring-guns, man-traps, or other engines calculated to destroy human life or inflict grievous bodily harm, the English courts turned a question of fact into a question of law, and were not successful in their efforts to prescribe adequate rules for determining the reasonable necessity of such engines under the varying circumstances of different cases. *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 B. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Orump*, 8 M. & W. 728; *Wootton v. Dawkins*, 2 C. B. (N. S.) 412; *Loomis v. Terry*, 17 Wend. 496; *Johnson v. Patterson*, 14 Conn. 1; *State v. Moore*, 31 id. 479; *Gray v. Combs*, 7 J. J. Marsh. 478, 483; Sidney Smith on Spring Guns (Phila. ed. of his Essays, 1848), pp. 150, 227; 10 Campbell's Lives of the Chancellors, 63. This error of the courts was partially corrected by acts of parliament (7 and 8 Geo. IV, c. 18, §§ 1, 2, 3, 4; 24 and 25 Vict., c. 100, § 31) making it a misdemeanor to set such engines, except in a dwelling-house, for the protection thereof in the night,

and excepting such gin or trap as may have been or may be usually set with the intent of destroying vermin. If the courts had refrained from the invasion of the province of the jury, it would not have been necessary for the legislature to make this imperfect restoration of the common law, or to provide penalties for its violation. If the reasonable necessity of employing defensive machinery of all kinds had been left to the jury, as such a question of fact should have been, much judicial and legislative trouble would have been avoided, and the general principles of the common law would have been sufficient. The evil effects of holding fact to be law, practically demonstrated in this branch of the doctrine of defense, should operate as a warning against similar mistakes.

It is reasonable that the kind and amount of defensive force should be measurably proportioned to the kind and amount of danger, to the apparent consequences of using the force, and the apparant consequences of not using it. The probable consequences on both sides are to be considered and compared. There is a great difference between an attack made upon A by B, and an attack made upon him by B's dog. On A's side the consequences of his being killed by B, and the consequences of his being killed by B's dog, may not be materially different. But on the other side, the consequences of his defending himself by killing B, and the consequences of his defending himself by killing B's dog, regarded from a human point of view, which is the one adopted by human law, are very different. The difference in the common-law values of the lives destroyed exhibits the reasonableness of adjusting the quality, quantity, and time of defensive force with some reference to consequences. A, when attacked by B, may kill him if it is reasonably necessary to do so; when attacked by B's dog he may kill the dog, if it is reasonably necessary to do so. But, a kind, degree, and imminence of danger caused by the attack of the dog might make it reasonably necessary to kill him, although the same kind, degree and imminence of danger caused by B's attack might not make it reasonably necessary to kill him. If A were not in danger of being killed or grievously injured by B's attack, it might be unreasonable to destroy B's life, when it would be both reasonable and highly meritorious to destroy the dog's life, though his attack caused no more danger than the attack of B. An assault and battery committed by the dog might justify his destruction (*Credit v. Brown*, 10 Johns. 365), although a

Aldrich v. Wright.

similar assault and battery committed by a man might not justify homicide, "the law distinguishing, to many and most essential purposes, between property and the life of man." DALLAS, J., in *Deane v. Clayton*, 7 Taunt. 518. The right to kill a man in self-defense is not the test of the right to kill a dog in self-defense. Reasonable necessity is the test in both cases; but what is reasonably necessary against a canine assailant may not be reasonably necessary against a human one, although the same danger be caused by each. The dominion of man over brutes is a part of the natural order recognized by the common law; and, judging by the human standards of the common law, taking them as the perfection of human reason, it is reasonable that a man should discriminate between the consequences of killing a man and the consequences of killing a dog, because the common law estimates human life and human limbs as vastly more valuable than all things commonly regarded as property, and estimates canine life as comparatively worthless, dogs and cats being classed with domesticated vermin. 1 Bl. Com. 130; 4 id. 182, **235; 2 id. 393; 1 Hale's P. C. 512; 1 Hawk. P. & C., ch. 33, § 23; *Findlay v. Bear*, 8 S. & R. 571; *Woolf v. Chalker*, 31 Conn. 121.

There is also a great difference between an attack made upon A by B, and an attack made upon A's dog by B. A, being attacked by B with a deadly weapon, may instantly kill him, if it is necessary to do so to save his own life; but A's dog being attacked by B in the same manner, the authorities would not justify A in instantly killing B, even if the dog's life could not otherwise be saved.

These illustrations present the defensive destruction of life, founded as it is, by law and by natural reason, upon the consequences of destruction compared with the consequences of non-destruction. It is evident that, in many cases of equally imminent danger, the right of destruction depends upon the question whether the assailant is a man or a brute, and upon the question whether the party assailed is a man or a brute. An indiscriminating rule of imminent danger abolishes these distinctions, and tries the defendant by the tests of murder. Why, then, was he not indicted and tried for murder, instead of being harassed by this petty suit?

Brill v. Flagler, 23 Wend. 354, was trespass for killing a dog. The defendant pleaded that the dog was accustomed to come upon

the close of the defendant in the night-time as well as in the day-time; and, by his barking and howling, annoy and disturb the defendant and his family; and the plaintiff did not restrain the dog from coming upon the defendant's premises although requested so to do, and because the dog was upon the defendant's premises, and about his dwelling-house at the time, etc., annoying, incommoding, and disturbing him and his family, and because the dog could not otherwise be restrained, the defendant killed him. This was held a good plea, on the ground that the noise of the dog was an intolerable nuisance, justifying the violent defense; that it would be a mockery to refer the defendant to the remedy of an action against the plaintiff, which would be far too dilatory and impotent for the exigency of the case; that the peace and repose of a man's family are to be regarded in the law as at least equal in value to the life of a dog; and that the death of the plaintiff's dog was essential to the free and perfect enjoyment by the defendant of his property, as well as to the protection and comfort to his family. But, if the barking and howling had been continued by the plaintiff himself, after the death of his dog, the difference between the legal values of human and canine life would have been a material circumstance to be considered, on the question of the reasonableness of the defendant killing the plaintiff as a method of abating the continued nuisance. *Loomis v. Terry*, 17 Wend. 499. There was just cause for killing the dog; but killing his owner for a like cause, according to the authorities, would be murder.

The immense value at which the law appraises human life makes it legally reasonable that the destruction of it, as a means of averting danger, should be resorted to only when the danger is immense in respect of consequences, and exceedingly imminent in point of time. But the extent of danger and the degree of imminence requisite to justify a deadly defense against a human aggressor, were not requisite to justify the act of the defendant in this case.

On the question of the reasonable necessity of his act, the insufficiency and impracticability of other more tardy and less vigorous kinds of defense are to be considered.

A violent ejection of a human trespasser from one's premises may be unnecessary, if the trespasser will depart when ordered off. It may be reasonable to notify him to leave before using violence to expel him, when a notice will evidently be as effectual as force. If an order is enough to accomplish the object, violence may be

Aldrich v. Wright.

excessive; when a word is a sufficient defense, a blow may be an attack and not a defense. But this defendant was not bound to give these intruders notice to depart, because it would probably have been worse than useless. If, by noisy and harmless demonstrations, he had endeavored to make known his desire that they should retire from his premises and trouble him no more, they might well have taken the notice as a sign of present danger, and a warning to instantly secrete themselves. How large the pond and island were, and what was the character of that part of the country, the case does not inform us; but there probably was an abundance of secure retreats for such animals within gunshot. At all events, frightening them away might not be a reasonable task to impose upon the defendant. Their ability to quickly conceal themselves in that vicinity might be materially increased by their amphibious character. And it was not reasonably necessary for him to throw away his only opportunity of a feasible defense, by causing them to betake themselves to some near hiding-place, where they could safely await his departure.

Taylor v. Newman, 4 B. & S. 89, was an action brought to recover a penalty imposed by statute for unlawfully killing a domestic pigeon. A farmer, annoyed by a flock of pigeons which were in the habit of feeding upon his land, notified their owner that he should be compelled in self-defense to shoot them if they were not prevented from doing further injury to his crops. Finding them afterward feeding in his field, he fired at them, and thereby caused them to rise, and then fired again and killed one of them. It was argued, for the plaintiff, that the killing of the pigeon after it had risen from the ground was an act unnecessary for the protection of the crops; but MELLOR, J., said it would have been on the ground again after the firing of the gun was over. That was the objection to frightening the minks: they would have been on the ground after the frightening was over. In *Evans v. Lisle*, 7 C. & P. 562, where persons had climbed into a church tower and were ringing the church bells, an unsuccessful attempt was made to dislodge them with the fumes of burning brimstone. If such a method would have expelled the minks, the law of nature and reason does not enjoin the removal of one nuisance by the introduction of another.

Howell v. Jackson, 6 C. & P. 733, was trespass for false imprisonment, brought against the keeper of a public-house. The defense was, that the plaintiff conducted himself in a riotous, quarrelsome,

Aldrich v. Wright.

disorderly, and uncivil manner, and committed a breach of the peace in the defendant's house, and, though requested to depart, refused so to do; and the defendant caused him to be taken into custody by a policeman, and removed to a watch-house, and detained until he could be taken before a magistrate. The policeman testified that he went into the defendant's house, and found the plaintiff and five or six other young men "skylarking, bonneting, and kicking up a rump; and there was a piece-of-work." The verdict was for the defendant. The course taken by the tavern-keeper was not open to Mr. Wright.

When a human trespasser, who disregards a notice to quit, can be expelled by gently laying hands upon him, it may not be reasonably necessary to use a higher degree of violence. In actions for assault and battery, a common justification is, that the plaintiff, though requested, refused to leave the defendant's close, whereupon the defendant *molliter manus imposuit*. But *molliter manus imponere* was one of the prime difficulties of this defendant. Besides, if he could have gently laid his hands on these creatures, what could he lawfully do with them? He would not be bound to support them in close confinement: and if he could not shoot them, he could not put them to death by starvation. He could not deposit them on the land of another person without making himself liable to an action of trespass. He might set them down on his own land in the highway; but he would not expect them to stay there. If he carried them away a short distance, they would have a short distance to come back. *Wood v. Gale*, 10 N. H. 247. The further he carried them, the better opportunity they would have to return before him. If he could put them out of his premises, how could he keep them out? Cattle may be excluded by fences; and, when found damage feasant, may be impounded at their owner's expense: but these remedies were not adapted to the nature of this case.

Neither was there a remedy in guarding the fowls day and night. The profit accruing from six old geese and eight young ones would not pay the expense of constant convoy. His property might as well be consumed by the minks as by the cost of a guard. But, however small the value of the property, he had a right to protect it by means reasonably necessary: reasonable necessity included a consideration of economy; and eternal vigilance, as the price of success in his limited anserine business, was not reasonable. According to the precedent of charging the watch to bid any one stand.

and, if he will not stand, to let him go, the defendant should have been thankful if the minks, when challenged, had gone off; but their halt at the island showed no inclination to go any considerable distance. What practicable method was there of protecting the geese in the peaceful possession and enjoyment of the pond? Without a resort to fire-arms, his situation would seem to have been full of embarrassment. The invasion of his premises was annoying; the legal perplexities, with which it is now claimed he was environed, had they been understood by him at the time, would have been distressing.

If (as a jury would probably find the fact to be) it apparently was reasonably necessary for him to kill the minks in order to prevent their doing mischief to his property, the authorities do not show that he transcended the right of defense.

Wadhurst v. Damme, Cro. Jac. 45, was trespass for killing a dog. The defendant pleaded that one Willoughby had a warren, whereof the defendant was warrener, and that the plaintiff's dog was divers times killing conies there, and therefore the defendant, finding him there running at conies, killed him. This was held a good plea; "because, it being alleged that the dog used to be there killing conies, it is good cause for the killing him, in salvation of his conies; for, having used to haunt the warren, he cannot otherwise be restrained." And POPEHAM, C. J., said: "The common use of England is, to kill dogs and cats in all warrens, as well as any vermin; which shows that the law hath been always taken to be that they may well kill them."

Athill v. Corbett, Cro. Jac. 463, goes to show that a dog is a kind of property, for the taking of which trespass lies; but the case is too imperfectly reported to be useful on any other point.

In 2 Rol. Abr. 567, l. 33, it is said that in *Lewin's* case it was held, if a man hunt with a dog in another's warren, the owner of the warren cannot justify killing the trespasser's dog with his own dog by his own incitation, which probably means that the owner of the warren could not justify killing the trespasser's dog without reasonable necessity; that, as a matter of fact, the intruder, upon notice, would be likely to withdraw with his dog from the warren, and so prevent his doing further mischief therein; or that, for some other reason, the evidence did not show the fact of reasonable necessity.

Barrington v. Turner, 3 Lev. 28, was trespass for killing two

dogs. The defendant pleaded that the dogs killed a deer in his park, upon which, to prevent more mischief by them, he took them and killed them. It was argued that the plea was bad; because, after the deer was killed, and the defendant had captured the dogs, it was not necessary to kill them; but the plea was held good.

Wright v. Ramscot, 1 Saund. 82, 84; 1 Sid. 336; 1 Lev. 216; 2 Keb. 237; 3 Salk. 139, was trespass for killing a mastiff dog with a knife. The defendant pleaded that the mastiff, in the street, ran violently upon and bit a dog of one Ellen Bagshaw; and the defendant, as her servant, killed the mastiff, to save the other dog from being destroyed by the mastiff. This plea was held bad, because it did not allege that it was necessary to kill the mastiff to save the other dog. The purpose of saving the other dog was alleged; but the defendant's purpose in killing the mastiff was not equivalent to a reasonable necessity for killing him. Reasonable necessity was not alleged in general terms; nor was it alleged that the defendant could not otherwise part the dogs or take off the mastiff; nor were any facts alleged which, in the ancient strict construction of special pleading, could make a case of reasonable necessity. The decision, therefore, is not an authority against the doctrine of reasonable necessity; nor does it show what weight should be given to that contrast of values and consequences which would have helped to determine whether it was reasonably necessary to kill the mastiff if he had attacked something more valuable than another dog.

Keck v. Halstead, Lutw. 1494, was trespass for killing a dog. The defendant pleaded that the dog was very fierce, and accustomed to bite mankind, whereof the plaintiff had notice; that the dog entered the defendant's yard many times, and went back and forth through the yard barking and growling, and remained there a long time, namely, an hour at least at each time, so that the defendant and his family, from fear of being bitten by him, did not dare to go into the yard at those times to do their lawful business there freely and without fear or danger; that the defendant gave the plaintiff notice, and requested him to restrain the dog from entering the yard any more, to do which the plaintiff wholly neglected and refused; that the dog, unmuzzled, afterward again fiercely entered the yard, and there remained, so that the defendant and his family from fear of the dog and the danger of being bitten by him, did not dare to go into the yard to do their lawful business there; that the defendant, for that cause, could not have any use of his vard

Aldrich v. Wright.

without killing the dog; wherefore he shot the dog, then being in his yard, for the security and preservation of himself and his family. After verdict for the defendant, on motion of the plaintiff in arrest of judgment, this plea was held good.

Janson v. Brown, 1 Camp. 41, was trespass for shooting a dog. The defendant, having pleaded the justification that the dog was worrying and attempting to kill a fowl of the defendant, and could not otherwise be prevented, offered to prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. Lord ELLENBOROUGH ruled that this would not make out the justification, to which it was necessary that, when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means. This ruling required the evidence to conform very strictly to the plea, which alleged that the dog was attempting to kill the fowl; that is, was making the attempt at the very moment he was shot. But whether a plea that it was reasonably necessary to kill the dog to prevent his killing the fowl would have been a good plea, and whether the evidence offered would have been competent to be submitted to the jury in support of such a plea, were points not raised or considered. Upon the evidence offered, the jury might have found that the fowl, although dropped for an instant, was in danger of being immediately caught up again and killed, and so was in imminent peril; and it would be strange if a plea could not be so drawn as to state a good defense in such a case. The dog might have been lawfully killed when he had the fowl in his mouth (*Leonard v. Wilkins*, 9 Johns. 232); and the fowl being wholly or partly in his mouth, or an inch, a foot, a rod, or twenty rods distant, is all a matter of degree and of fact for the consideration of the jury, on the question of the danger and the reasonable means of protecting the fowl.

Vere v. Cawdor & King, 11 East, 568, was trespass for shooting a dog. King pleaded that he was Lord Cawdor's game-keeper; and because the dog was in Cawdor's manor, running after, chasing, and hunting divers hares, he shot him for the preservation of the said hares. This plea was held bad. It might have been properly held bad (as suggested by Lord ELLENBOROUGH, who delivered the opinion), because it did not state that the hares were put in peril so as

to induce any necessity for killing the dog. But the decision appears to have been put on some other ground, not distinctly reported. It was held that the dog did not incur the penalty of death, and that the game-keeper had no right to kill him for running after the hares. The question whether the dog was putting them in imminent peril seems to have been regarded as immaterial. It may have been so held on the ground suggested by LE BLANC, J., during the argument, that the hares, not being reduced to possession like rabbits in a warren or deer in a park, were not the property of the owner of the land. In wild animals alive, fully grown and free, not domesticated, inclosed, or confined, which have in themselves a principle and power of motion, and can convey themselves from one part of the world to another, a man can have no absolute property. 2 Bl. Com. 389, 390, 411; 4 id. 235; Com. Dig., title Biens (F); Bac. Abr., title Game; 3 Greenl. Ev., § 163; Roscoe's Cr. Ev. 454; *Hannam v. Mackett*, 2 B. & C. 934; *Blades v. Higgs*, 12 C. B. (N. S.) 501; 13 id. 844, 866; *Norton v. Ladd*, 5 N. H. 203. And the decision in *Vere v. Cawdor & King* may have been that, at common law, King had no right to kill the plaintiff's dog in defense of hares to which Cawdor had no title that he could set up against the dog; and that King, as Cawdor's game-keeper, was authorized, by the English statutes in relation to game, to "take and seize" the dog, but not to kill him. 22 and 23 Car. II, c. 25; Bac. Abr., title Game; *Deane v. Clayton*, 7 Taunt. 506, 511, 512, 517. Whatever the ground of the decision was, the case does not define the imminence of the danger which, at common law, justifies violence in the defense of property which the owner has a right to defend.

Wells v. Head, 4 C. & P. 568, was an action for shooting a dog. The dog had worried some sheep belonging to the defendant, but had left the field in which the sheep were, had crossed an adjoining close, and was in a third when the defendant shot him. ALDERSON, B., ruled that the plaintiff was entitled to a verdict, and said it was clear that the dog was not shot in protection of the defendant's property, as it was after he had left the field in which the sheep were. It might have been proper for the jury to find that, as a matter of fact, upon peculiar circumstances in that case, the dog was not likely to return and renew his attack, and that the danger had ceased; although a jury, acquainted with the inveterate and irresistible impulses of sheep-killing dogs, would probably be slow in

Aldrich v. Wright.

arriving at that conclusion. If the ruling had been intended to require the defendant to leave his sheep in jeopardy while he went to give notice to the plaintiff, or to stand guard over them and to wait for a renewal of the attack when he would be likely to kill the sheep by firing at the dog, the law, which allows every thing reasonably necessary to be done in defense, would not have been properly applied in that case ; but Baron ALDERSON seems merely to have declared that, as a matter of fact, the sheep were in no danger. Reports of such cases may mislead us, if we follow the English habit of disregarding the distinction between law and fact, or take it for granted that every reported case contains something more than an opinion of a court on a question of fact.

Protheroe v. Matthews, 5 C. & P. 581, was trespass for shooting a dog. A tram-road for coal wagons running through the park of one Morgan was also used as a foot-way, and was not fenced off from the park. The dog followed three women who were walking along this road, ran off the road, chased deer in the park, and then returned to the women in the road, and lay down within twenty yards of the gate by which the women were going to leave the park ; and in that situation the dog was shot by the defendant, who was a servant of Morgan. TAUNTON, J., instructed the jury that it was not essential to the defense that the dog should have been chasing the deer at the very moment he was shot ; that it was sufficient if the chasing of the deer and the killing of the dog were all one and the same transaction ; but that, if the chasing was at an end, and would not have been recommenced, the plaintiff was entitled to a verdict. In the present case, it was a question of fact for the jury whether the chasing of the geese was at an end, or whether it was likely to be recommenced.

Morris v. Nugent, 7 C. & P. 572, was trespass for shooting a dog. The defendant pleaded that the dog attacked him, and would have bitten him, had he not defended himself. As the defendant was passing the plaintiff's house, the dog ran out and bit the defendant's gaiter ; on the defendant's turning round and raising a gun which he had in his hand, the dog ran away ; and as he was running away, and before he had got more than five yards off, the defendant shot and killed him. Lord DENMAN ruled that the plaintiff was entitled to a verdict because the dog was not attacking the defendant when he was shot. The defendant, in pleading, put his case on the ground that the dog would have bitten him if he had not defended

himself ; and REDFIELD, C. J., in *Brown v. Carpenter*, 26 Vt. 643, suggests that Lord DENMAN's ruling was made upon the form of the issue rather than the law of defense. As a matter of fact, it might not have been absolutely necessary to kill the dog at that time ; but the defendant's right of defense was to do what apparently was reasonably necessary, and, time enough having elapsed for the dog to run not more than five yards, it was a question for the jury whether the defendant, in the excitement and confusion of so sudden an attack and retreat, had such reasonable apprehensions as to justify his shot. In some respects, there was less urgency in his case than there was in *Wells v. Head*. He could have gone to the plaintiff's house and given notice to restrain the dog; or, he could have gone about his business without leaving unprotected sheep behind him ; if the attack were renewed, he could fire at the dog without pointing his gun at himself ; and the carnivorous and blood-thirsty disposition of the dog might be less excited by biting a gaiter than by biting a sheep. But whether the defendant was bound to be in a state of mind favorable for giving due weight to such considerations may be questionable.

King v. Kline, 6 Penn. St. 318, was an action for killing a dog. The defendant proved that the dog was vicious, ferocious, and unruly, and had come upon his premises and abstracted some fish from the wall of his house, where they had been hung to dry. The defendant set a trap at that place, and the dog coming again was caught, and shot by the defendant. The court instructed the jury, if they believed the evidence given by the defendant, it was not of that nature which authorized him to kill the dog. This instruction was held erroneous.

Parrott v. Hartsfield, 4 Dev. & Bat. 110, was trespass for killing a dog. The defendant proved that the dog had killed some of his sheep in his pasture ; the defendant, being notified of the fact, went in pursuit with a gun ; the dog escaped at that time, but returned about two hours afterward to the premises of the defendant, and was near the pasture fence where the sheep were, when the defendant saw him and immediately shot him. The plaintiff insisted that in order to support the plea of justification, the defendant must prove that he could not otherwise preserve his sheep than by killing the dog, or that the dog was shot in the very act of killing the sheep. The court instructed the jury that the defendant was justified in killing the dog, if the evidence satisfied them

Aldrich v. Wright.

that the dog had destroyed the sheep, and had returned two hours thereafter, and was on the premises of the defendant, near his pasture, under circumstances calculated to produce a belief, in an ordinary man, that the dog was lurking about the inclosure to commence again the work of destruction, and was killed under a reasonable apprehension that it was necessary, to prevent a repetition of the mischief. The defendant had a verdict and judgment, and, on appeal, the instructions were held correct, GASTON, J., delivering the opinion of the court. It had happened that the dog killed some of the defendant's sheep; but that was merely a piece of evidence bearing upon the question of reasonable apprehension, which was a question of fact for the jury; if he had been interrupted before overtaking the objects of his pursuit, as the minks were in the present case, the pursuit would have been evidence on which the jury might have found danger, or a reasonable apprehension of it.

Perry v. Phipps, 10 Ired. 259, was trespass for killing a dog. The defendant, going into the plaintiff's yard, would probably have been bitten by the plaintiff's dog, if the dog had not been driven off by the plaintiff's family; while the dog was retreating, and at the distance of ten steps from the defendant, the defendant shot him. The court instructed the jury that they might infer that the defendant did not shoot the dog to protect himself; and it was held that the circumstances were properly left to the jury as evidence on which they might find that the defendant did not act on the defensive.

Morse v. Nixon, 6 Jones (N. C.), 293, was trespass for killing a hog. For the purpose of showing that it had the reputation of a chicken-eating hog, the defendant proved that it had killed one chicken, and attempted to kill another. It does not appear whose chickens they were, or when they were attacked; it is to be inferred from the decision that they were not the defendant's. There was evidence that the hog, when killed, was about seventy-five yards from the public road, near the fence of the defendant, where his chickens were in the habit of running. There was no evidence that the hog, at the time it was killed, was in the act of doing any injury to the defendant or his property. The court charged the jury, that if they believed the hog was of a predatory character, and had the character of a chicken-eating hog, then they would find for the defendant, as any man had a right to abate a public

Aldrich v. Wright.

nuisance. These instructions were held erroneous. And they clearly were erroneous in holding, as a matter of law, that a hog of a predatory and chicken-eating character was a public nuisance which any man had a right to abate, without regard to the reasonable necessity of the particular case. The decision recognized a distinction between the reasonable necessity of killing a hog, and the reasonable necessity of killing a dog.

It has been held that a dangerous dog running at large is a common enemy and a nuisance, and that his destruction is justifiable, though not necessary to prevent any mischief impending at the moment. *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351; *Loomis v. Terry*, 17 Wend. 500; *Maxwell v. Palmerston*, 21 id. 407; *Dunlap v. Snyder*, 17 Barb. 566; *Brown v. Carpenter*, 26 Vt. 638; *Bowers v. Fitzrandolph*, Addison, 215; *King v. Kline*, 6 Penn. St. 318; *Dodson v. Mock*, 4 Dev. & Bat. 146; *Perry v. Phipps*, 10 Ired. 261; *Woolf v. Chalker*, 31 Conn. 121, 128, 130; *Parker v. Mize*, 27 Ala. 483. This class of cases, understood as maintaining the right of destruction when its exercise is a reasonably necessary protection of the persons or property of those claiming the right, or of the persons or property of others for whom they are, in law or in fact, authorized to act (3 Bl. Com. 5; 1 Bishop's Cr. L., §§ 716-721, 851, 877; *Fuller v. Bean*, 30 N. H. 181; *Graves v. Shattuck*, 35 id. 269; *A. M. Co. v. Goodale*, 46 id. 56; *Brown v. Perkins*, 12 Gray, 89; *Morse v. Nixon*, 6 Jones [N. C.], 295) seems to be unobjectionable. In dealing with the right of defense, courts have fallen into some conflict and confusion, as courts always will when they inadvertently turn a broad question of fact into a narrow question of law. It is easy to abandon the comprehensive rule of the reasonable necessity of the case, which is the whole law of defense; but it is not so easy to invade the province of the jury, and establish a legal test of reasonable necessity exactly adapted to the peculiar circumstances of every case that can arise.

The tests of reasonable necessity, which have been applied to cases of defensive homicide, cannot be applied to the defensive killing of minks. The authorities are, that a man may oppose a deadly resistance to a felonious attack, but not to a mere trespass (a trespass against a man's castle being sometimes excepted. 3 Greenl. Ev., § 117; 1 East's P. C., ch. 5, § 56; *Com. v. Drew*, 4 Mass. 391, 396; Rosc. Cr. Ev. 770; 1 Bishop's Cr. L., § 858, 5th

Aldrich v. Wright.

ed. A man, in defense of his possession of land or goods, "may justify an assault and battery; but he cannot justify either maiming or wounding, or manning of life and member; and so note a diversity between the defense of his person and the defense of his possession or goods. 2 Inst. 316. Where the trespass is barely against property, "the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon." 1 East's P. C., ch. 5, § 56. But a man, upon whom or whose property another manifestly intends to commit a known felony by violence or surprise, is not obliged to retreat; on the contrary, he may pursue his adversary, and kill him if necessary to prevent the felony. 1 East's P. C., ch. 5, §§ 44, 45; 3 Greenl. Ev., § 115; 4 Bl. Com. 180; Fost. Cr. L. 274.

"Where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting;" but "the law of England" will not "suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death." 4 Bl. Com. 181, 182; 1 Bishop's Cr. L., § 849, 5th ed. The rule generally laid down is, that a deadly resistance is lawful only against an apparent, forcible felony,—the idea of felony being "so generally connected with that of capital punishment that we find it hard to separate them." 4 Bl. Com. 98. "It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death." 4 Bl. Com. 18. So long a list might perhaps be made to enumerate all, and even more than all, the attacks which it would ordinarily be reasonably necessary to resist unto the death of the attacking party; but such a list, attached as a limitation to the doctrine of defense, would be an attempt to turn the fact of reasonable necessity into an absolute and arbitrary schedule of legal rules that would be likely to operate very unjustly in some cases, because of the difficulty of foreseeing and providing for the infinite variety of circumstances and the illimitable diversity of considerations that might be involved in so broad a question as the kind, degree, and time of defense reasonably necessary for person or property. If the rule stated by Blackstone were adopted, and defensive homicide were allowed only to prevent a capital crime, it would not be allowed in any case in this State at the present time,

Aldrich v. Wright.

except when necessary to prevent murder in the first degree. Such is not understood to be the law. *Gray v. Coombs*, 7 J. J. Marsh. 478. If the old English list of one hundred and sixty capital crimes were the legal catalogue of attacks to which, when violent, a deadly resistance might be made, the law would be very different from what it is now generally supposed to be.

If, according to the general rule of the common-law authorities, it may be reasonably necessary, for the reason stated by Blackstone, to kill a man only to prevent his committing a capital crime, how can the rule survive the reason on which it was founded? If, by some inscrutable process, it does survive,—if the distinction between a felony and a mere trespass is still a test,—this defendant, although he might kill a man if necessary to prevent his forcibly committing the felony of stealing a goose (4 Bl. Com. 237; *Lyford v. Farrar*, 31 N. H. 314) yet could not kill him to prevent his stealing things of far greater value, being real, or savoring of the realty, or bonds, bills, notes, or other evidences of or securities for debts or other choses in action (4 Bl. Com. 232, 234; 1 Hawk. P. C., ch. 33, §§ 21, 22), or committing a vast amount of malicious mischief. 4 Bl. Com. 233; *Com. v. Keith*, 8 Metc. 531. If such recondite, arbitrary, and irrational tests are to be employed, the right of defense, guaranteed by the constitution as a natural, essential, and inherent right, is a very unnatural and dangerous one; for, in a great number of cases, however reasonably necessary a deadly defense might be, no one, without a lawyer's technical knowledge, could make such a defense without running great risk of the gallows. But, suppose the defendant had been a profound lawyer; had known perfectly well that it might be reasonably necessary, by homicide, to prevent an apparent, violent felony, but not a trespass or misdemeanor; had thoroughly understood the general rule, and all the qualifications, exceptions, and nice distinctions to be found in the books on the subject; and had been able to reconcile or otherwise dispose of conflicting precedents and opinions, and accurately to remember and exactly apply all the authorities, at an instant's notice, in excitement and disturbance,—his learning in that branch of the law would have availed him nothing in the adjustment of his defensive measures to the reasonable necessity of the case presented by these minks, but would, if relied upon, have greatly increased his embarrassment. The distinction between felony and trespass attempted by the aggressor, which has been

Aldrich v. Wright.

supposed to be in general a test of the right to kill him, like all other tests devised in former times to illustrate the predominance of the sanctity of human life among the considerations of reasonable necessity, is inapplicable to the present case.

One who finds game, that is, wild animals fit for food, on his own ground, cannot justify pursuing them into the land of another. *Deane v. Clayton*, 7 Taunt. 489. But in *Mitten v. Paudrye*, Popham, 161, DODGE, J., said: "In the time of Chief Justice POPHAM, this case was adjudged in this court: trespass was brought for hunting, and breaking of hedges; and the case was, that a man started a fox in his own land, and his hounds pursued him into another man's lands, and it was holden that he may hunt and pursue him into any man's land, because a fox is a noisome creature to the Commonwealth." And other authorities hold that a man may justify an entry and a reasonable trespass upon another's land for killing mischievous vermin, that is, wild animals not fit for food. *Gundry v. Feltham*, 1 D. & E. 334; *Nicholas v. Badger*, cited in 3 D. & E. 259, note a; Bac. Abr., title Game. Wild ducks being valuable, an action lies for frightening them from a decoy pond; and grouse being valuable, an action lies for frightening them away from a man's land. *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, 11 id. 574, note; 11 Mod. 74; 3 Salk. 9; Holt. 14, 17, 19; *Ibbotson v. Peat*, 3 H. & C. 644. But rooks being worthless and destructive, it has been held that no action lies for frightening them away from a man's premises. *Hannam v. Mocket*, 2 B. & C. 934. In the latter case, BAYLEY, J., delivering the opinion of the court, said: "In considering a claim of this kind, the nature and properties of the birds are not immaterial. The law makes a distinction between animals fitted for food, and those which are not; between those which are destructive to private property, and those which are not; between those which have received protection by common law or by statute, and those which have not. It is not alleged in this declaration that these rooks were fit for food; and we know, in fact, that they are not generally so used." Whether all the English authorities on the subject are or are not in every particular sound, and adapted to the condition of this country, they at least tend to show that (with perhaps some exceptions not pertinent to the present inquiry) mischievous vermin, alive and free, including all classes of noxious wild animals, beasts,

birds, insects, and reptiles, not fit for food, are worthless in the estimation of the common law.

"Larceny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, gray-hounds, blood-hounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, etc., or their whelps, or calves, because, though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, etc., made tame, which, though wild by nature, serve for food." 1 Hale's P. C. 511, 512; *Rea v. Searing*, Russ. & Ry. 350; *Norton v. Ladd*, 5 N. H. 203; *Warren v. State*, 1 Greene (Iowa), 106, 111. "Of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, * * larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed. As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny." 4 Bl. Com. 236, **235; 2 id. 393.

"The taking * * of any creatures whatsoever which are *domitæ naturæ*, and fit for food, as ducks, hens, geese, * * may be felony;" but subjects of larceny "ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever they may be valued by the owner, shall never be so highly regarded by the law, that for their sakes a man shall die." 1 Hawk. P. C., ch. 33, §§ 28, 23. For the sake of vermin, though tame and in some sense valuable, a man shall not die. Capital punishment for stealing a domesticated goose, but not for stealing a domesticated mink, such is the discriminating discipline of the common law. Human life of inestimable value; domesticated animals, valuable for food or for practicable use, far less worthy than the human species; domesticated vermin less worthy still; mischievous wild vermin, a public nuisance, such is the common-law appraisal. Under this system, the malicious destroyer of human life is liable to indictment and death, but not to a civil action. for ancient reasons difficult to be now discovered, possibly of theologi-

Aldrich v. Wright.

cal origin (Exodus, xxi, 12, 18, 19, 22, 23; Leviticus, xxiv, 17, 18; Numbers, xxxv, 31), possibly derived from the difference between human life which no man owns, and other life which may be the subject of property (*Wyatt v. Williams*, 43 N. H. 102); the malicious destroyer of property in domesticated brutish life is liable to an action for the damage to property, but not to indictment; the felonious taker of another's domesticated animals, of the class recognized by the law as fit for food, or otherwise useful or profitable, is liable to an indictment and an action; the taker of another's domesticated animals of the vermin class is liable to an action, but not to indictment; the taker on another's land of wild animals alive and free is liable, for the taking, neither to an action nor an indictment. Whether these distinctions are, in detail, sound or unsound, and whether some of them do or do not cease to exist when larceny ceases to be a capital crime, they at least show a general recognition of a gradation of values; and if the common law furnishes no fixed and definite standard for a pecuniary measurement of the differences in the legal values of the various orders of creation, it does recognize mankind as far above, and wild vermin as far below, domestic poultry. And the test of the reasonable necessity of killing an individual of the highest order, emanating from the peculiar worth of that order, cannot be deduced from the worthlessness of the lowest. If the legal sacredness of all human life, ranking far above the value of property, is the sole reason for holding it reasonably necessary that an owner of property should submit to a trespass which he can only prevent by destroying such life, the legal inferiority of vermin life in its wild state, too base to be admitted to the lowest rank of property, is a sufficient reason for holding it reasonably necessary that an owner should prevent a trespass by the prompt destruction of such life. And if the remedy of an action at law for slight injuries (3 Bl. Com. 4; 4 id. 185; 1 Hale's P. C. 481; 2 Bishop's Cr. L., § 641) is an additional reason for requiring scrupulous care in resisting a felon, and for not killing a human trespasser at all, the absence of such a remedy in this case was an additional reason for using some other than inadequate measures of extreme gentleness, and for instantly employing a remedy likely to be lost by delay.

Perhaps the statute upon which this suit is brought is to be regarded as elevating minks above the base character and position held by them at common law. But it does not elevate them to the

rank of property, nor take them out of the class of wild vermin. And whatever elevation there is is intermittent, occurring only during a portion of each year. The statute is not a prohibition of killing them, but a regulation of the time when they may be killed, enacted not out of any tenderness for them. The object of the statute, hinted at in the title of the original act (Laws 1866, ch. 4228) is, not that these "fur-bearing animals" shall not be killed, but that there may be more of them to be killed, and that killing them may be a more lucrative business. In the case of a man, the law surrounds his life with unparalleled safeguards for the sake of his life conclusively presumed to be of incalculable value; in the case of a mink, it is not his life, but his pelt that the statute takes an interest in. How impossible, then, it is to apply the severe tests of reasonably necessary defensive homicide, founded upon grand considerations of the sacredness of human life, to the reasonably necessary defensive destruction of vermin life, so far from being sacred in the contemplation of the statute and the common law. And when the rule of imminent danger has been so much applied in cases of homicide as to acquire a peculiar technical meaning, founded on and adapted to the sacredness of the subject-matter of those cases, how probable it is that such a rule, applied to a case like this, without the qualifications and explanations necessary to adapt it to the subject-matter of the suit, would convey erroneous ideas of the law, mislead the defendant and the jury, and work injustice.

The quantity, quality and time of justifiable defensive force depend upon the reasonable necessity of each case; and that reasonable necessity, depending upon the particular circumstance of the case, is a question of fact, like a question of reasonable use of land or water; *Bassett v. S. M. Co.*, 43 N. H. 569; *Sweet v. Cutts*, 50 id. 439; *Hayes v. Waldron*, 44 id. 580; or reasonable time; *Faver v. Philbrick*, 5 id. 358; *Goodall v. Streeter*, 16 id. 97; *Barker v. Barker*, id. 335; *Watson v. Walker*, 23 id. 492; *Tufts v. Hayes*, 31 id. 188; *Knowlton v. Tilton*, 38 id. 263; *Odlin v. Gove*, 41 id. 476; *Tyler v. Webster*, 43 id. 147; *State v. Plaisted*, id. 413; *Wallace v. Co.*, 44 id. 523; 2 Kent's Com. 480 (*contra*, *Morse v. Bellows*, 7 id. 549, 566; in *Concord Bank v. Gregg*, 14 id. 331, and *Doe v. Thompson*, 22 id. 217, the court found the fact from the evidence which was apparently submitted to the court); or reasonable place; *Currier v. Currier*, 2 id. 75; *Flanders v. Lamphear*, 9 id. 201; *Rhoades*

Aldrich v. Wright.

v. *Parker*, 10 id. 86; *Holmes v. Fisher*, 13 id. 9; *Miles v. Roberts*, 34 id. 254; or reasonable cause to believe a man guilty; *Eastman v. Keazor*, 44 id. 518, 520; *Lister v. Perryman*, L. R., 4 H. L. 521; or reasonable cause to believe a dog vicious; *Kittredge v. Elliott*, 16 id. 77, 82; or reasonable sufficiency of a highway; *Johnson v. Haverhill*, 35 id. 74; *Hall v. Manchester*, 40 id. 410; *Clark v. Barrington*, 41 id. 44, 52; *Howe v. Plainfield*, id. 135, 138; *Winship v. Enfield*, 42 id. 197; *Chamberlain v. Enfield*, 43 id. 356; or reasonable care in using a highway; *Carlton v. Bath*, 22 id. 559; *Palmer v. Portsmouth*, 43 id. 265; or reasonable care, diligence or skill in bailment and other cases; *Leighton v. Sargent*, 27 id. 460; *Shepley v. Felt*, 3 id. 121; *Dow v. Sayward*, 12 id. 271.

The usual pretext for turning fact into law is the convenience and importance of certainty and minute specification in the rules of action, by which men are required to govern themselves. 1 Bishop's Cr. L., § 855; *Gray v. Jackson*, 51 N. H. 36. But, if turning the fact of reasonable necessity into a matter of law has been practically useful in cases of homicide and assault, the same metamorphosis extended, without limitation, to cases like this, would be productive of serious inconvenience and uncertainty. When the defendant was considering what to do, how much would he have been aided by advice to beware of violating the law, and suspend defensive operations until he had first tested the reasonable necessity of shooting, by such criteria as the distinction between trespass and felony, the dogma requiring a request to depart (modified as it is in cases of trespass *vi et armis*), the plea of *son assault demaine*, and the doctrine of *mollitur manus imposuit*? How much certainty would he have derived from such a warning? It would seem to him that things had come to a strange pass, if a man could not, without going through a course of legal study, be qualified to judge of the reasonable necessity of shooting minks caught in the act of chasing his geese, and taking forcible possession of his pond. And, if he had happened to be conversant with the doctrine of imminent danger, as it is generally laid down in reported cases of homicide and assault, instead of his course being cleared by that kind of knowledge, he would, by its guidance, have plunged into inextricable difficulty. Applying that rule of imminent danger, he would probably conclude that he could not lawfully fire at the minks until they came so near their prey that his defense would be as dangerous as their attack.

"All our jurists hold that a certain quantity of risk to life or limb justifies a man in shooting or stabbing an assailant; but they have long since given up in despair the attempt to describe, in precise words, that quantity of risk. They only say that it must be, not a slight risk, but a risk such as would cause serious apprehensions to a man of firm mind; and who will undertake to say what is the precise amount of apprehension which deserves to be called serious, or what is the precise texture of mind which deserves to be called firm? It is doubtless to be regretted that the nature of words and the nature of things do not admit of more accurate legislation. * * * A man beset by assassins is not bound to let himself be tortured and butchered without using his weapons, because nobody has ever been able precisely to define the amount of danger which justifies homicide." 2 Macaulay's Hist. Eng. 368, 369 (Am. ed., 1849).

III. The claim that the defendant was liable, if the geese could have been protected by driving them away from the minks, cannot be sustained.

Requiring the defendant to drive away the minks if he could, is an admission that he had a right to drive them away, and that they had no right to remain on his premises without his consent. But, requiring him, if he could not drive them away from the geese, to drive the geese away from them, is a practical denial of his right to keep geese in his own pond or on his own land, if he could only keep them there by killing minks. It amounts to this: it being impracticable to permanently eject the assailants, he must banish the assailed; and the raising of geese being impossible, the raising of minks is compulsory. A freeholder, permitted to fire blank cartridges only to cover the endless retreat of his poultry before these marauders, and obliged to suffer such an enemy to ravage his lands and waters with boldness generated by impunity, is a result of turning the fact of the reasonable necessity of retreating to the wall before a human assailant into a universal rule of law. This rule practically compels the defendant to bring his poultry to the block prematurely, and to abandon an important branch of agricultural industry. His right of protecting his fowls is merely his right of exterminating them.

Not only is one species of his personal property extinguished, the freedom of rural life restricted, and a profit of husbandry cut off, but he is forced to surrender his domain to hostile occupation,—

Aldrich v. Wright.

his rights in real estate are materially impaired. The fee, to be sure, remains in him; but he involuntarily holds it in trust for the use of others, whom he is physically unable to expel, because the only defensive measure that would be effectual is prohibited. If the use of his land is taken from him for a private purpose, how can his constitutional right of acquiring and possessing property be thus infringed? If the use is a public one, how can his right be taken without compensation? *Ash v. Cummings*, 50 N. H. 591, *Aiken v. B. C. & M. R. R.*, 51 id. 504, and other cases, admit the land-owner's freedom from the invasion of private use; and maintain his right to compensation for the inundation of his land for public use,—a use less inconsistent with the business of raising aquatic poultry, than the use of his land as a camp and nursery for destructive vermin. His right of compensation is annihilated; and his right of defense, established by the primary law of nature, and guaranteed by the common law and the constitution, is reduced to an aggravating abstraction by the error of giving to vermin the benefit of a test of the reasonable necessity of defensive homicide. founded on the transcendent legal worth of human life.

It is reasonably necessary that the person who kills another in his own defense should have first retreated as far as he conveniently or safely can, to avoid the violence of the assault. And though, under some circumstances, in a time of war, it may be a reproach to flee from the public enemy; yet, between two citizens under the same government in a time of peace, "the law countenances no such point of honor, because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. * * * * The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him." 4 Bl. Com. 185; 1 Hale's P. C. 481. This maxim of retreating to the wall is a statement of fact properly illustrating the weight to be given to the sanctity of human life in determining the reasonable necessity of killing a human being. It has been turned into law, and applied, as a rule of law, in cases of homicide, where the accused set up, in justification, the prevention of a felony; but it is not applicable to the defensive destruction of vermin.

What authorities are there requiring a retreat in this case? None have been found, though diligent search has been made. In *Wad-*

BROWN V. COLLINS.

(33 N. H. 442.)

Action — trespass to property — accidental injury.

Defendant's horses, while being driven by him, with due care, on a public highway, were frightened by a locomotive, became unmanageable and ran upon plaintiff's land and broke a post there. *Held*, that defendant was not liable for the damage. (*See note, p. 384.*)

TRESPASS to recover the value of a stone-post. The post was situated upon the plaintiff's premises, in the village of Tilton, but within about four feet of the line of the highway. There was no fence or other barrier between it and the highway. Defendant was driving his horses with due care in the highway, near where the railroad crossed it; the horses became frightened at a locomotive and unmanageable, and ran away, striking in their course against said post and breaking it. The foregoing facts were agreed upon.

Rogers, for plaintiff.

Barnard & Sanborn, for defendant.

DOE, J. It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault, that he was not guilty of any malice, or unreasonable unskillfulness or negligence; but it is to be inferred that the fact was so; and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent, and desire of the defendant.

Sir Thomas Raymond's report of *Lambert & Olliott v. Bessey* (T. Raym. 421), and *Bessey v. Olliott & Lambert* (T. Raym. 467), is. "The question was this: A jailer takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, whether the jailer be liable to an action of false imprisonment? and the judges of the

Common Pleas did all hold that he was; and of that opinion I am, for these reasons:

"1. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and, therefore, Mich. 6 E. 4. 7. a. pl. 18. *Trespass quare vi et armis clausum fregit, et herbam suam pedibus calcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoots at butts, and hurts another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

"Mich. 23. Car. 1 B. R. Stile 72. *Guilbert v. Stone*. Trespass for entering his close, and taking away his horse. The defendant pleads that he, for fear of his life, by threats of twelve men, went into the plaintiff's house, and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

"Hop. 134, *Weaver v. Ward*. Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter, et per infortunium et contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. * * But

the three other judges resolved that the defendant, the jailer, could not be charged, because he could not have notice whether the prisoner was legally arrested or not."

In *Fletcher v. Rylands*, L. R., 3 H. L. 330, Lord CRANWORTH said: "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

The head-note of *Weaver v. Ward*, Hob. 135 is: "If one trained soldier wound another, in skirmishing for exercise, an action for trespass will lie, unless it shall appear from the defendant's plea that he was guilty of no negligence, and that the injury was inevitable." The reason of the decision, as reported, was this: "For though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and, therefore, if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with its circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

There may be some ground to argue that "utterly without his fault," "inevitable," and "no negligence," in the sense intended in that case, mean no more than the modern phrase "ordinary and reasonable care and prudence;" and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all "the circumstances" or evidence sustaining the plea, would be substantially in compliance with the

law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often held liable "because," as Raymond says, "he that is damaged ought to be recompensed;" and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him: when and why "the loss and damage" should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. They were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject.

Mr. Holmes says: "It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, any thing savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in *Rylands v. Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle, sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes

to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at the certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision. 7 Am. Law Rev. 652, 653, 662; 2 Kent's Com. (12th ed.) 561, n. 1; 4 id. 110, n. 1. If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from any thing done upon his own land" (Mellish's argument in *Fletcher v. Rylands*, L. R., 1 Ex. 272), and that an individual is answerable "who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor." GIBBS, C. J., in *Sutton v. Clarke*, 6 Taunt. 44, approved by BLACKBURN, J., in *Fletcher v. Rylands*, L. R., 1 Ex. 286. If danger is adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort, into a question of reasonableness in a form much broader than has been generally used; or courts will be left to devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by transferring the hardship to the other party, any thing more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions, better reasons may now be given than were thought of when the decisions were announced: but whether a satisfactory test of an actionable tort can be extracted from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher v. Rylands*, 3 H. & C. 774; L. R., 1 Ex. 265; L. R., 3 H. L. 330; L. R. (Phil. ed.), 3 Ex. 352, can be sustained, is very

doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by BLACKBURN, J., who says, in *Fletcher v. Rylands*, L. R., 1 Ex. 279, 280, 281, 282: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there, any thing likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And, upon authority, this we think is established to be the law, whether things so brought be beasts, or water, or filth, or stench. The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law, as to them, seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls

to gore (or, he might have added, dogs to bite), but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. * * * In these latter authorities (relating to animals called mischievous or ferocious), the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. * * * There does not appear to be any difference, in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor."

This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. *Filliter v. Phippard*, 11 A. & E. (N. S.) 347, 354; *Tubervil v. Stamp*, 1 Comyns, 32; S. C., 1 Salk. 13; Com. Dig., *Action upon the case for Negligence* (A. 6.); 1 Arch. N. P. 539; *Fletcher v. Rylands*, 3 H. & C. 790, 793; *Russell v. Fabyan*, 34 N. H. 218, 225. No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied, by BLACKBURN, to every thing which a man brings on his land, which will, if it escape, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule, as laid down in the English cases, is a class of cases in reference to damage from fire communicated from

Brown v. Collins.

the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one, building a fire upon his own premises, can be made liable if it escapes upon his neighbor's premises, and does him damage, without proof of negligence." *Loose v. Buchanan*, 51 N. Y. 476, 487; S. C., 10 Am. Rep. 623.

Every thing that a man can bring on his land is capable of escaping, against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art, and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things: it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made by Lord CAIRNS, *Rylands v. Fletcher*, L. R., 3 H. L. 330, between a natural and a non-natural use of land, if he meant any thing more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in the wilderness, ignore the rights growing out of a civilized state of society, and makes a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state, are not absolute but relative" (*Loose v.*

Buchanan, 51 N. Y. 485); and, if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher v. Rylands*, L. R., 1 Ex. 286, 287, Mr. Justice BLACKBURN, commenting upon the remark of Mr. Baron MARTIN, "that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says, "this is no doubt true; and, as was pointed out by M. Mellish, during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack v. White*, 11 C. B. N. S. 588, 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott v. London Dock Company*, 3 H. & C. 596, 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to the warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident carrying a traveler off the street. But such a doctrine would open

Brown v. Collins.

more questions, and more difficult ones, than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country because he could avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced, by sacerdotal influence, from what was supposed to be the Roman or the Hebrew law. 7 Am. L. Rev. 652, *note*; 1 Domat Civil Law (Strahan's translation, 2d ed.), 304, 305, 306, 312, 313; Exodus, xxi: 28-32, 36; xxii: 5, 6, 9. It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade and productive enterprise, when the common law had not been set forth in the precedents, as a coherent and logical system on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in *Rylands v. Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be

Brown v. Collins.

defendant is entitled to judgment. 1 Hilliard on Torts, ch. 3, 3d ed.; *Loose v. Buchanan*, 51 N. Y. 476; S. C., 10 Am. Rep. 623; *Parrot v. Wells*, 15 Wall. 524, 537; *Roche v. M. G. L. Co.*, 5 Wis. 55; *Eastman v. Co.*, 44 N. H. 143, 156.

Case discharged.

NOTE.—The following decision of the English Court of Exchequer, made in June, 1875, is of interest in this connection:

HOLMES AND WIFE v. MATHER.

Trespass to person — Accidental injury — Driving in public streets.

The defendant, who kept two horses at a livery stable, being desirous of trying them in double harness, had them put into his carriage, and driven by a groom employed at the stable, while he himself sat beside the groom. As the groom was driving, the horses were startled by a dog, and became unmanageable, to such an extent that the groom could not stop them, though he still retained some control over them. The groom endeavored to turn down a side street, but, failing to do so, drove on to the pavement, and injured the female plaintiff.

The jury having found that there was no negligence on the part of any one: *Held*, that the act of the groom, in giving to the horses the direction which brought them on the pavement, and into collision with the female plaintiff, being neither negligent nor willful, did not give a cause of action.

Per BRAMWELL, B.—People, as they go along public roads, must put up with such mischief as reasonable care on the part of others cannot avoid.

Quære, whether, assuming that an action would have lain against the groom, it would have lain against the defendant.

The first count of the declaration alleged that the defendant so negligently drove a carriage and horses upon the highway, that they ran against the female plaintiff, etc.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff, etc.

The defendant pleaded not guilty, and upon that plea issue was joined.

At the trial, before FIELD, J., the following facts were proved:

The defendant kept two horses at a livery stable in North Shields, and, wishing to try them in double harness for the first time, had them harnessed to his carriage, and driven by one of the grooms employed at the livery stable. As they were being thus driven, and while the defendant was sitting on the box close to the groom, the horses were so startled by a dog which suddenly rushed out at them, that they ran away, and became so unmanageable that the groom could not stop them, though he was able still to retain sufficient control over them to guide them to a certain extent. The groom, when the horses became thus unmanageable, begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom turned the horses safely round several corners, and at last guided them into Spring terrace, at right angles to, and at the end of which runs Albion street, a shop in Albion street being opposite the end of Spring terrace. When they reached the end of Spring terrace, the horses made a sudden swerve to the right, and the groom then pulled them still more to the right, intending to get them safely, if possible, round the corner. This he was unable to accomplish, and the horses and carriage were dashed against the palisades in front of the shop, and the female plaintiff, who was upon the pavement, close to the shop and the palisades, was knocked down and injured.

Brown v. Collins.

The jury found that there was no negligence in any one.

The plaintiff's counsel contended that it was unnecessary to prove negligence, as the hand of the groom gave to the horses the direction which brought them and the carriage into collision with the plaintiff, and that consequently the second count, for trespass, was proved. The verdict was entered by the learned judge for the defendant, leave being reserved to the plaintiffs to move to enter it for them for 50*l.* on the second count, the court to be at liberty to draw inferences of fact, and to make any amendments in the pleadings necessary to enable the defendant to raise any defense that ought to be raised.

Herschell, Q. C., having obtained a rule nisi, pursuant to the leave reserved.

C. Russell, Q. C., and Crompton, for the defendant, showed cause. — It is not clear upon the evidence, in the first place, that the driver did give to the horses the direction which brought them on to the plaintiff. The horses had swerved to the right, and the driver was pulling them still more to the right, so that he was rather pulling them away from the place where the plaintiff stood than pulling them on to it. But the jury have found that there was no negligence; and without negligence such an action as the present is not maintainable, unless, indeed, the act causing the injury is a willful and intentional act. The true principle is clearly expressed in the judgment of the Exchequer Chamber, in the case of *Fletcher v. Rylands*, L. Rep., 1 Ex. 285, 286: "Traffic," it is said, "on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway may well be held to do so, subject to their taking upon themselves the risk of injury from their inevitable danger." The cases of *Hammack v. White*, 5 L. T. Rep. (N. S.) 676; 11 C. B. (N. S.) 588; 31 L. J. 129, C. P., and *Scott v. London Docks Company*, 13 L. T. Rep. (N. S.) 148; 3 H. & C. 596; 34 L. J. 220, Ex., are examples of the application of this doctrine. *Leame v. Bray*, 13 East, 593, 599, was a case in which the defendant, though otherwise free from negligence, was driving his carriage upon the wrong side of the road, upon a dark night, and where the objection, which was a pleading one, was, that as the injury happened from negligence, and not willfully, the declaration ought to have been in case, and not, as it was, in trespass; and the only result was, that the court arrived at the conclusion that the count in trespass was maintainable. The ground upon which it was held to be maintainable was, that trespass would always lie where the injurious act was the immediate result of the force originally applied by the defendant, and that it was immaterial whether the act was willful or not.

LAWRENCE, J., is reported as saying: "If one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt the action must be trespass;" and so, no doubt, as a matter of pleading, it must then have been; but unless such a sudden turning was a wrongful or negligent act, it would not be actionable in any form. Mr. Justice LAWRENCE there is assuming that such a sudden turning round in a place where others might be, would be wrongful. There must be a wrongful act done by the defendant, or by those over whom he has control, in order to entitle a person injured by any act done by him or his servants to maintain an action. In *Wakeman v. Robinson*, 1 Bing. 213, 215, DALLAS, C. J., says: "If the accident happened entirely without default on the part of the defendant, the action does not lie." Again the defendant is not liable in trespass, even if the groom were so liable. There is no true relationship of master and servant between them; but if there were, the mere sitting on the box would not make the master liable for the

servant's trespass. *Morley v. Galsford*, 2 H. Bl. 442; *M'Manus v. Orickett*, 1 East, 106; *M'Laughlin v. Prior*, 4 M. & G. 48, 58.

They also cited *Sharrod v. London and North Western Railway Company*, 4 Ex. 580, 586; 20 L. J. 185, Ex.; *Scott v. Shepherd*, 1 Sm. Law Cas., 8th edit., p. 417; *Gibbons v. Pepper*, 1 Ld. Raym. 38.

Herschell, Q. C., and Gainsford Bruce, in support of the rule.—The plaintiff would not have been injured if the groom had not done an act. He directed the horses on to the plaintiff. He may have done the best for himself and his master in pulling the horses on to the female plaintiff, but he thereby did an act which he had no legal right to do. *Leame v. Bray*, 3 East, 583, 589, is an authority to the effect that trespass lies when the injury is occasioned immediately by an act of force of a defendant. Here the groom had some control over the horses, and that distinguishes the present case from *Hammack v. White*, 5 L. T. Rep. (N. S.) 676; 11 C. B. (N. S.) 588; 81 L. J. 129, C. P., where the defendant did all he could to prevent the horse from taking the direction which it actually took. Besides, in *Hammack v. White*, there was not a count in trespass, and the present point was not taken. The case of *Chandler v. Broughton*, 1 C. & M. 29; 3 Tyr. 220, shows that if the groom is liable, the defendant, who is his employer, also is liable. This case was approved of and followed in *M'Laughlin v. Prior*, 4 M. & G. 48. The fact of his sitting on the box and not interfering with or complaining of the management of his horses by the groom is evidence that he was assenting to the act which caused the accident. In *Leame v. Bray*, 3 East, 583, 589, GROVE, J., says: "Looking into all the cases, from the Year-Book in 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass; " thus making no mention of negligence as an ingredient in a trespass. It is not an element in a trespass to land; why should it be one in a trespass to the person?

BRAMWELL, B.—I am inclined to think that the groom and the defendant may be regarded as being in the same position as to liability; but, for the purposes of the present case, it is not necessary to decide that question; therefore, I abstain from so doing. For the purposes of the judgment I am about to deliver, I shall assume that, if the groom is liable, the defendant is equally so, and, so assuming, what do we find to be the facts? The groom is absolutely free from blame; he does nothing wrong; on the contrary, he endeavors to do what is, under the circumstances, the best to be done. The misfortune happens through the horses being so startled by a dog that they ran away with the groom and the defendant. If the plaintiff can, under these circumstances, maintain an action, I see no reason why she should not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye, and so injured it. The fact is, that for the convenience of mankind in carrying on the affairs of life, people as they go along public roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. Upon the facts of the present case there is no cause of action. That is the general view of the case. Now, I will put it a little more specifically, and address myself to the consideration of the arguments urged by Mr. Herschell. He says: "Had the driver done nothing, this misfortune would not have happened to the female plaintiff; but he gave the horses a pull or inclination in the direction of the plaintiff—he drove them, in fact, on to her. It is true he endeavored to drive them further away from the place, by getting them to turn to the right, but he did not succeed in doing that. I think

Brown v. Collins.

the argument is not tenable. In this case, as in most cases, you must look at the immediate act that did the mischief; you must look at what the driver was doing immediately before the mischief happened. I think the answer to the argument is, that you cannot complain of the man unless he was immediately doing the act that did the mischief to you. Now, the driver did not guide the horses upon the plaintiff; he guided them away from her, so far as he could, and they ran away with him, upon her, not in consequence of, but in spite of his guidance. This is not a case, as I understand the facts, where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. The present is a very different case from that. The driver here was endeavoring to guide the horses but was taken on to the pavement in spite of himself. The observation made by my brother POLLOCK, in the course of the argument, is, to my mind, irresistible; that if Mr. Herschell's contention is right, it must come to this, that if I am being run away with, and sit quiet, and let the horses run wherever they think fit, I am not liable, because it is they who, of themselves, run against any one or any thing; but if I do my best to avoid injuring any thing or any one, and guide my horses, as far as I possibly can, so as to avoid doing damage, then it may be said that it is my act of guiding them that brings them to the place where the accident happens, and that I am, therefore, liable for the accident. Surely this is impossible. As to the cases cited, they are, in reality, decisions upon a question of pleading merely. They simply decide upon the point whether the plaintiff ought to have declared in trespass, or upon the case. The result of them is this, that if the act that does an injury is an act of direct force, *vi et armis*, then trespass is the proper remedy, if any. But in cases such as the present, there is no remedy at all, where the act is not a wrongful act, that is to say, where the act is neither a willful act nor yet a negligent act; though, if the act were wrongful, the proper form of action would be trespass. In *M'Laughlin v. Prior*, 4 M. & G. 43, the defendant was present, and the case was decided on the ground that there was sufficient evidence to show that he was taking part in the management and control of the horses. In *Leame v. Bray*, 8 East, 588, 589, there was an act of direct force, *vi et armis*, and there was negligent driving. *Sharrod v. London & North Western Railway Company*, 4 Ex. 590, was a case in which the master was not present. I think I could distinguish the case cited from the Year-Book, but it is enough to say that the defendant there let out animals liable to stray, whether frightened or not, into an uninclosed place, and without anybody to keep them in bounds."

CLEANEY, B.—I would add a word as to a point on which Baron BRAMWELL has not given any judgment. It is this: That the present is not a case where the act that is done must be justified, as where a man does an act in order to avoid something else; but it is a case where, in order to charge the defendant, it must first be shown that the act complained of was the act of the defendant. I sum up all in these words: the horses were not driven there by the defendant's servant, but went there in spite of him. There is one other point I wish to mention. In my opinion, it is not by any means clear that the act was the act of the master; the master resigned all control to the groom, and ceased to take any share in the management of the horses: so that the case, I think, falls within the principle enunciated by PARKE, B., in *Sharrod v. London & North Western Railway Company*, 4 Ex. 590, 593. He says: "In all cases where the master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent—no more."

POLLOCK, B., concurred.

Rule discharged.

RIDDLE V. LITTLEFIELD.

(88 N. H. 502.)

Landlord and tenant — lease — outer walls of demised premises.

The owner of a building leased a "store" therein. *Held*, that the lessee had the right to the use and occupation of the outer walls belonging to that portion of the tenement, including the store, for the purpose of posting bills and notices thereon.

ASSUMPSIT for the use and occupation of certain portions of plaintiff's building, and for money had and received for the plaintiff's use. Plea, the general issue.

Plaintiff was the owner of a building called "Riddle's building" in Manchester. He leased the corner store therein to one Harrison, who assigned his lease to defendants. After such assignment, and during the term of the lease, the defendant used the outer wall of said store for the purpose of posting bills and notices upon, and had granted permission to others so to use said wall, receiving therefor the sum of \$15, which is the money claimed by plaintiff. Plaintiff claimed to be solely entitled to use said wall for such purposes, and to the moneys arising from its use by others. The lease under which defendant held was of the store "with all the privileges and appurtenances to the same belonging."

The court ruled *pro forma* that the plaintiff was not entitled to recover, and reserved the questions of law for this court.

B. F. O'Leary, for plaintiff.

Morrison, Stanley & Hiland, for defendants.

FOSTER, J. By the terms of the lease of a "certain store * * in Riddle's building * * being the same now occupied by Thomas Dunlap, and known as No. 191 Elm street," the lessee acquired the right to the use and occupation of the outside of the walls belonging to that portion of the tenement which included the store. He took it as parcel of the demised premises proper, and not as a thing technically appurtenant thereto. The outside wall of a

Riddle v. Littlefield.

building leased or conveyed, passes by the lease or deed as much as the inside of the same wall.

Appurtenances are defined, "things belonging to another thing, as principal, and which pass as incident to the principal thing." Bouv. Law Dic. Another definition is, "a thing used with and related to or dependent upon another thing *more worthy*, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant." 3 Washb. Real Prop. *626, *629; Com. Dig., Appendant and Appurtenant, A. The word "appurtenances" has a technical signification, and, when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. Smith & Soden's Landlord and Tenant, 86. When the term is thus used, in order to constitute an appurtenance, there must exist a propriety of relation between the principal or dominant subject, and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. *Id.*

These distinctions are refined, and in the common practice of modern conveyancing are not much regarded, the term appurtenances, in a vast majority of cases in deeds and leases, having in fact, I presume, no meaning whatever in the minds of the contracting parties, who append the unnecessary formula by force of the custom and example which has, for so long a time, applied it to grants and leases of a principal thing, to which no inferior easement or servitude whatever, in fact, belongs.

If employed in its true and technical sense, it may sometimes have such meaning and importance, that, if omitted, an appurtenance will not pass. And the use of such superfluous formula is ordinarily harmless, and will seldom lead to confusion or misunderstanding. But, ordinarily, whatever easements and privileges legally appertain to property, pass by a conveyance of the property itself, without any additional words. Smith & Soden's Landl. and Ten. 86-88. "The grant of a thing passes the incident, as well as the principal, though the latter only is mentioned; and this effect cannot be avoided without an express reservation." Thus, a garden is parcel of a house, and passes without the addition of the word "appurtenances." Taylor's Landl. and Ten., § 161. A grant of a thing will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the thing granted. 3

Riddle v. Littlefield.

Washb. Real Prop. *626. Grant of a messuage passes the house with the close upon which it is built, and "the little garden, yard, field, or piece of void ground, lying near and belonging to the messuage." Shep. Touch. 94; Co. Litt. 216; see *Gibson v. Brockway*, 8 N. H. 465. Messuage is a term of large signification, always including land. 2 Wendell's Blackstone, *17, note 4; and, in *Scholes v. Aar-graves*, 4 D. & E. 46, it was applied to a house and land, including a shop for the sale of wares. If a house or a store be conveyed, every thing which belongs to it, or is in use with it, and whatever is essential to the enjoyment, passes as an incident, unless specially reserved. When any thing is granted, all the means to attain it, and all the fruits and effects of it, are also granted, and will pass inclusive without the words "*cum pertinentis*;" for it is a maxim, *cuiusque aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potest*. 4 Gr. Oruise, *265; Broom's Leg Max. *362; Shep. Touch. 89; 4 Kent's Com. *467; *Pomfret v. Rickroft*, 1 Saund. 321, 323; *United States v. Appleton*, 1 Sumn. 492; and see *Cocheco Man. Co. v. Whittier*, 10 N. H. 305; *Kittredge v. Woods*, 3 id. 503; *New Ipswich Factory v. Batchelder*, id. 190; *Winchester v. Hees*, 35 id. 43; *Dunklee v. Wilton Railroad*, 24 id. 489.

Certain words usually employed in a lease, as house, farm, land and the like, have, if necessary, a very wide meaning; and where such general and comprehensive terms are employed, all things usually comprehended within the meaning thereof will pass, unless the circumstances of the case show, very clearly, that the intention of the parties was otherwise. 1 Pars. on Cont. 499.

Now, it will hardly be contended that the outside wall of a store or house is not essential for the reasonable and proper enjoyment of the interior of the building. The outer side of the wall is but one side of the same wall that has an inner side; and the removal of the wall removes both sides.

If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it, not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with the lawful and reasonable enjoyment of the property.

If he uses the tenement for a store, he would ordinarily be entitled to affix his signs to the outer wall; an awning, also, if such appendage should be deemed necessary or convenient. He may suspend his wares upon the building, if nobody is incommoded

Riddle v. Littlefield.

thereby ; and he may cover the outer walls with his advertisements of the merchandise which he keeps for sale within, if he does not injure the building, nor obstruct the public passage, nor offend the public eye and taste by unseemly exhibitions, or otherwise violate the laws. And if he may thus incumber and cover the exterior walls of his store, clearly his lessor cannot do the same thing at the same time. The occupation by both parties to the lease, for incongruous purposes, is impossible. If the premises are leased for a clothing store, for example, the lessor cannot use for a bulletin-board the space which the lessee may reasonably, properly, conveniently, and profitably occupy with the ready-made garments which he there suspends for exhibition and sale.

Who, then, shall occupy the exterior walls of the demised building ? The landlord, who for a sufficient consideration has parted with the possession and use of the property, *usque ad filum viæ* (if it is bounded by a street) ? or the tenant, who cannot have the full and complete as well as reasonable beneficial enjoyment of the property for which he pays rent, without the opportunity to display his wares and his advertisements upon the external walls of the building ?

The lessee who affixes his signs and advertisements upon the wall, or thereupon suspends his wares, does so in order to attract custom, and thereby increase the profit derived from the use of the demised premises. The outer wall is therefore to him a source of legitimate profit. And, as the lessor does not ordinarily prescribe the uses to which the interior of the store shall be devoted — provided only the use be not offensive, improper, or illegal — so he may not, otherwise than with the same proviso, prescribe the uses to which the outer walls may be devoted by his lessee. If the lessee deems it more advantageous to employ the walls for advertising the goods or the business of others, receiving payment therefor, than to advertise or expose his own goods upon the wall, it is none of the landlord's business, unless he has restricted and forbidden such use of the premises, or inserted in his lease a covenant against the sub-letting of them.

It would be singular if a landlord, who had leased a building for the purposes of trade, might occupy the outer walls of the same building for displaying the advertisements of a rival trader ; but this result might very probably follow, if the lessee might not control the use of the exterior walls.

It appears from the case that the lease, by its terms, granted the right to the lessee to occupy a portion of the very space which the lessor now claims the right to control, by putting a window there, a use quite incompatible with the lessor's claim to exclude the defendant entirely from its occupation. It appears, also, that a prior tenant permitted the lessor to occupy the outer wall for posting placards, without objection; but the fact that Mr. Dunlap did not choose to avail himself of all his rights or advantages is not a circumstance which can affect the present lessee. Nor can the present lessee be concluded by knowledge that Mr. Dunlap acquiesced either in an infringement by the landlord of his rights as a lessee, nor the fact that he may have occupied the premises upon different terms and considerations affect the question now before us. The defendant hired the premises with their usual and ordinary incidents, without limitation or reservation; and he is entitled to make such use of them as, being consistent with the purposes for which they were demised, shall at the same time be neither injurious to the lessor nor offensive to the public.

With these views, and in accordance with the provisions of the case, there must be

Judgment for the defendants.

SPAULDING V. WOODWARD.

(88 N. H. 572.)

Partition — right to — provision in deed against.

The owner of land conveyed an undivided share of it by warranty deed, which contained, after the description and before the *habendum*, this clause, "to remain in common and undivided." *Held*, that the clause was neither a condition nor a covenant, and that the vendor was not estopped to sue his grantee for partition.

PETITION for partition. The petitioner, Spaulding, being the owner of a tract of land, conveyed an undivided nineteen acres thereof to defendant's grantor by a warranty deed containing, after the description and before the *habendum*, the words "to

Spaulding v. Woodward

remain in common and undivided." The deed to defendant contained the same clause. A motion to dismiss was reserved.

Whidden, for petitioner.

J. Benton, for defendant.

FOSTER, J. The power of compelling partition is incident to all estates held by tenants in common. 1 Washb. Real Prop. 581. In *Morrill v. Morrill*, 5 N. H. 136, partition is said to be a matter of right; and the power and manner of compelling partition is prescribed by chapter 228, General Statutes; see, also, *Hoyt v. Kimball*, 49 N. H. 322. Undoubtedly, the right of partition may be waived by the parties in interest, who, by express condition or proviso, may restrain and inhibit the exclusive beneficial use and enjoyment of estates holden in common or joint tenancy, to any extent short of an absolute restriction of alienation. *Mitchinson v. Carter*, 8 D. & E. 60; *Coleman v. Coleman*, 19 Penn. St. 100; *Avery v. Payne*, 12 Mich. 540; *Hunt v. Wright*, 47 N. H. 396; *Hoyt v. Kimball*, before cited; Platt on Covenants, 404; Broom's Leg. Max. 539. But, if the language used in a deed is of doubtful meaning, courts will always interpret it with reference to the probable intention of the parties, which must always be made apparent in order to operate as a restraint or incumbrance upon the full and free enjoyment, title, and control of the property conveyed by deed. Thus, restrictive conditions are never favored in law; and if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted. *Hoyt v. Kimball*, before cited. Courts, moreover, will avoid either construction, unless the one or the other is plainly demanded by the terms of the deed. If it appear in the slightest degree doubtful whether any restraint upon the full and free beneficial use of an estate conveyed was intended by the parties to a deed, they will look carefully for some motive which may seem to indicate the intention of the parties, and aid the interpretation of the deed.

The clause which we are called on to interpret in this deed is not inserted as a restrictive condition, nor is it found among the covenants; but it is contained in the body of the premises, and is incorporated in the description of one of the tracts of land conveyed. No motive is apparent for making the clause a proviso, condition,

or covenant; and if such a purpose had been intended, it would naturally have found expression by unequivocal adoption in the proper formal parts of the deed. On the contrary, it seems to have been carelessly used as descriptive merely of the *status* of the land conveyed,—as of land which *is* in common and undivided,—the words “to remain” probably being used as equivalent to “remaining” or “the same being” in common, etc.

Such an interpretation being consistent with the ordinary incidents of estates, restrictive conditions being regarded with disfavor, and no reason being apparent for regarding the clause as a condition or a covenant, we are inclined to consider it as descriptive merely, and to hold that the parties are entitled to have partition.

Let an order issue to the trial term that partition be granted according to the mode provided by law.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

BREWER BRICK COMPANY V. INHABITANTS OF BREWER.

(22 Me. 62.)

Constitutional law — exemption from taxation by vote of town.

A statute authorized towns in which manufacturing establishments should be located to exempt the same from taxation for a term of years. *Held*, that the statute was unconstitutional because (1) it in effect authorized unequal taxation; and (2) the legislature could not delegate to a municipal corporation its power of determining upon what property taxes shall or shall not be imposed.

The remission of a tax by a vote of a town is in substance and effect the same as a gift, and a statute authorizing it is void.

ASSUMPSIT by the Brewer Brick Company to recover \$309.75, paid by it, under protest, to the defendant, that sum being the amount of a tax assessed for the year 1872, on the buildings, machinery and property of plaintiff used in their manufacturing establishment in Brewer.

The defendants at their annual town meeting, in March, 1870, in pursuance of statutes set forth in the opinion: "Voted, that the town will exempt from taxation, for a term of ten years, manufacturing and refining establishments hereafter erected in town,

Brewer Brick Co. v. Inhabitants of Brewer.

and the capital used for operating the same, together with such machinery hereafter put into buildings already erected, but not now used as such, and the capital used for operating the same; *provided*, that the capital invested shall not be less than \$10,000; and *provided*, further, that this vote shall not be construed to apply to manufacturing or business now carried on in the town; and no distillery of intoxicating drinks or malt beer shall be entitled to the benefit of this vote."

The Brewer Brick Company was organized under the general law of the State, on the 4th day of June, 1870, for the purpose of making brick by machinery, under a new process, operating by steam. Immediately after its organization, this corporation proceeded to erect the necessary buildings in defendants' town, and to fit them up with the requisite patented machinery, boilers, engine, etc., and have ever since been engaged in carrying on the business contemplated at its creation, having a capital invested in it of more than \$10,000. The business of brick-making has been constantly carried on for more than fifty years in different parts of the town by the old hand-process and horse-power.

In 1871 no tax was assessed upon the plaintiff, but in 1872 its property was assessed without any regard to the vote, and to avoid a distraint the tax was paid as aforesaid.

No objections were made to the *form* of proceedings by the town at the annual meeting of 1870, or in their assessment of the tax. If the plaintiff was liable to be so assessed, it was to be nonsuited; if not, it was to have judgment for \$309.75, and interest from March 12, 1873.

Wilson and Woodward, for plaintiff. The question is, whether R. S. 1871, ch. 6, § 6, ninth clause, and the previous legislation condensed in that clause, is constitutional or not. The United States constitution does not touch the subject. *Ohio Life Insurance and Trust Co. v. Debolt*, 16 How. 416.

It is in the power of the State to say what property shall be exempt from, and what shall be subject to, taxation. *Gordon v. Appeal Tax Court*, 3 How. 133; *State Bank v. Knoop*, 16 id. 369; *Horne of the Friendless v. Rouse*, 8 Wall. 430.

The presumption is in favor of the validity of the act. *Lunt's case*, 6 Me. 412; *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat. 625.

Brewer Brick Co. v. Inhabitants of Brewer.

The constitution of Maine, Art. IV, part third, § 1, gives the legislature "full power to make and establish all reasonable laws and regulations for the defense and *benefit* of the people of this State, not repugnant to this constitution nor that of the United States." What laws are reasonable and beneficial is for the legislature to determine. *Cooley's Const. Lim.* 27; *Moor v. Veazie*, 39 Me. 343; *State v. Noyes*, 47 id. 189.

The courts of other States have held legislation exempting certain classes of property constitutional. *Brewster v. Hough*, 7 N. H. 138; *Parker v. Redfield*, 10 Conn. 490; *Seymour v. Hartford*, 21 id. 481. "The taxing power may select the objects of taxation." *State Bank v. Knoop*, 16 How. 369; *Cooley's Const. Lim.* 514; *N. J. v. Wilson*, 7 Cranch, 164; *McGee v. Mathis*, 4 Wall. 143; *Dodge v. Woolsey*, 18 How. 331; *Wash. Uni. v. Rouse*, 8 Wall. 439.

A. W. Paine, for defendants.

APPLETON, C. J. This is an action of assumpsit to recover \$309.75 paid by the plaintiffs for taxes. The proceedings on the part of the defendants are admitted to have been correct, and the only question presented is, whether the property of the plaintiff, upon which the tax in question was assessed, is liable to assessment.

The business of brick-making has been carried on in the defendant town for more than fifty years until the present time, by the old process of making bricks with horse-power.

The plaintiff corporation was organized under the general law of the State, on the 4th day of June, 1870, for the purpose of manufacturing brick in the defendant town, and after its organization, proceeded at once to erect the necessary buildings and machinery for the manufacture of brick by the new process, in which business it has been engaged to the present time.

At the annual town meeting of the defendant town, held March 14, 1870, the following vote was passed, viz.: "Voted that the town will exempt from taxation, for a term of ten years, manufacturing and refining establishments hereafter erected in the town, and the capital used for operating the same, together with such machinery hereafter put into buildings already erected, but not now used as such, and the capital used for operating the same, *pro-*

Brewer Brick Co. v. Inhabitants of Brewer.

vided, that the capital invested shall not be less than \$10,000, and *provided*, further, that this vote shall not be construed to apply to manufacturing or business *now* carried on in the town; and no distillery of intoxicating drinks or malt beer shall be entitled to the benefit of this vote."

The estate of the plaintiffs was duly assessed for its just and proportional share upon the whole valuation of the property of the town liable to assessment. The plaintiffs claim exemption from contributing toward the public expenses, under and by virtue of this vote of the town.

By an act approved March 8, 1864, ch. 234, § 1, it is enacted, that "all manufacturing establishments, and all establishments for refining, purifying, or in any way enhancing the value of any article or articles already manufactured, hereafter erected by individuals or by incorporated companies, and all the machinery and capital used for operating the same, together with all such machinery hereafter put into buildings already erected, but not now occupied, and all the capital used for operating the same, are exempted from taxation for a term not exceeding ten years, after the passage of this act, where the amount of capital actually invested shall exceed the sum of \$2,000; *provided*, towns and cities in which such manufacturing establishments or refineries may be located, or in which it may be proposed to establish the same, shall, in a legal manner, give their assent to such exemption, and such assent shall have the force of a contract, and be binding for the full time specified; and *provided*, farther, that all property so exempted shall be entered from year to year on the assessment books, and returned with the valuations of the several towns and cities, when required by the State for the purposes of making the State valuation." By an act approved February 8, 1867, ch. 76, § 1, the exemption referred to in the act of 1864, ch. 234, § 1, takes effect from the date of the contract authorized by that act. By an act approved March 12, 1869, ch. 65, § 1, the exemption referred to takes effect "from the date of the assent given by the town to such exemption." The preceding legislation on this subject is found condensed in R. S. 1871, ch. 6, § 6, ninth clause.

Taxation exacts money from individuals as and for their contributory share of the public burdens. A tax is generally understood to mean the imposition of a duty or impost for the support of government. *Pray v. Northern Lib.*, 81 Penn. 69. "Taxes are

Brewer Brick Co. v. Inhabitants of Brewer.

burdens or charges imposed by the legislature upon persons or property," says DILLON, C. J., in *Hanson v. Vernon*, 27 Iowa, 28; S. C., 1 Am. Rep. 215, "to raise money for public purposes or to accomplish some governmental end." Private property may be taken under the power of eminent domain for public purposes, if just compensation therefor be made. But for private purposes it cannot be wrested from its owner even with compensation.

It has been settled by a series of decisions that the legislature cannot constitutionally authorize towns to raise money by taxation to give or loan to individuals or corporations for private purposes. A good public house may be very desirable, but in *Weeks v. Milwaukee*, 10 Wis. 242, the Supreme Court of Wisconsin justly treated with little consideration the claim of a right to favor, under the power of taxation, the construction of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." It was there decided that the public could not be compelled to aid such an enterprise from any regard to the incidental benefits to be derived therefrom. It may be very desirable to have a saw-mill in a town, and those who wish it have full liberty to erect it; but the inhabitants cannot legally be taxed to raise money to give or to loan to those who propose, for their own benefit, to erect one, or to take down one already erected, and to remove it from one town to another. *Allen v. Jay*, 60 Me. 124; S. C., Am. Rep. 185. A terrible conflagration sweeps over a city, destroying its wealth by millions. Its rebuilding is absolutely necessary for its commercial wants. But each lot of land is private property; each building to be erected thereon will be private property. Its erection is for private use. After full consideration, it was decided that the inhabitants of the city could not be taxed to raise money to loan to the sufferers to enable them to rebuild. *Lowell v. Boston*, 111 Mass. 454.*

In the *Commercial Bank v. The City of Iowa*, 2 Dillon, 353, it was held that the legislature of a State had no authority to authorize taxation in aid of *private* enterprises and objects; and that municipal bonds issued under legislative authority to be paid by taxation, as a *bonus* or donation to secure the location, or aid

* S. C., 15 Am. Rep. 39, to which is added the decision of the Supreme Court of the United States, holding after an elaborate examination the same doctrine.

in the erection of a manufactory or foundry, owned by private individuals, are void even in the hands of owners for value.

Contingent and incidental benefits may arise from the introduction of manufacturing capital whenever the enterprise is successful. But the reverse may equally ensue, and the enterprise become an injurious failure. The inhabitants of a town cannot legally be taxed to raise money to give or to loan to individuals or corporations for private purposes on account of any supposed incidental advantages which may possibly accrue therefrom. The benefits are precisely those arising from the introduction of capital or labor, and none other. It matters not whether it be the building of the huge factory of the capitalist or the cottage of the laborer, the benefits are the same in kind, and differ only in degree. There are benefits arising from the introduction of capital well invested and of labor well employed; but they are of the same nature as those arising from the existent capital of the place in which the incoming capital is to be invested, and the incoming labor employed. One is just as much entitled to protection as the other, and no more. But this benefit, whatever it may be, if any, arises from all capital and all labor; and as all labor and all capital is equally entitled to equal protection according to its extent, it follows that equal protection to all leaves the matter as it found it. Hence, it is universally held that the incidental benefits of capital afford no justification for partial taxation.

It is conceded in the argument that towns and cities cannot constitutionally be authorized to raise by taxation money to be given away. The plaintiff's share of the expenses of the defendant town for all public purposes is conceded to be \$309.75. If the town were empowered to raise that sum to give the plaintiffs, it is admitted that the act so empowering them would be unconstitutional, for if the town may raise money to give to A, they may do the same for B, and so on; and the property of the minority would be subject to the will of the majority. But the remission of a tax by a vote of the town is in substance and effect the same as a gift. What matters it to the plaintiffs or the defendants whether the town votes to give \$309.75 to the plaintiffs, or to exempt their property from its just and proportional tax, and assess the amount of such exemption upon the remaining estate liable to taxation? It is a gift. The money raised by the rest of the tax payers is

raised to give away; and if it may be done for these plaintiffs, it may be done for any other inhabitant as well.

But there are other and grave objections to the constitutionality of the statute upon which the plaintiffs rely.

"By the constitution, article 9, § 7: "While the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years."

The expenses for which assessments are to be made shall be public; those appertaining to the public service. No authority is given, either expressly or by implication, to assess for merely private purposes; as to give away, or to loan to individuals.

By article 9, § 8: "All taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." Though this section applies specially to real estate, yet the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, "according to its just value." It cannot for a moment be admitted that the constitution authorizes an unequal apportionment and assessment upon real and personal estate, without any reference to its "just value."

The power to impose taxes is broad and liberal: for roads, that there may be facilities for travel; for schools, that the people may be educated; for libraries, that their means of improvement may be increased; for the poor, lest they may suffer from want; for the police of the State, for the safety of the public, that crime may be detected; for the courts of law, that individual rights may be protected and enforced, and that crime, when proved, may receive its fitting punishment; in fine, for any and all purposes which, in the most liberal sense, can be deemed public. "Taxation having for its only legitimate object, the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes, is not a proper exercise of this power, and must therefore be unauthorized." *Cooley's Const. Lim.* 487.

The legislature may determine the amount of taxation and select the objects. They may exempt by general and uniform laws certain descriptions of property from taxation, and lay the burden of supporting government elsewhere.

But while there are no limits in the amount of taxation for public purposes, nor in the subject-matter upon which it may be

Brewer Brick Co. v. Inhabitants of Brewer.

imposed, the requirement that it shall be uniform and equal upon the valuations made is universal.

The general tax act is based upon the whole valuation of the State. The taxes are apportioned among the several towns in the ratio of their respective valuations. The manufacturing capital to be exempted by this statute is included in the valuation of the town in which the investment is made. Whether there shall be an exemption or not depends upon the vote of the town. Now it is for the legislature to impose taxes and to exempt from taxation. But exemption from taxation includes the imposition of taxes. To the precise extent that one man's estate is exempted from taxation, to that same extent is there an imposition of the amount exempted upon the rest of the inhabitants. The \$309.75 of which the plaintiffs would escape the payment, would be imposed upon the residue of the inhabitants of Brewer. This imposition of, and this exemption from, taxation are by the town and not by the legislature.

To have uniformity of taxation, the imposition of, and the exemption from taxation, must be by one and the same authority — that of the legislature. It is for the legislature to determine upon what subject-matter taxation shall be imposed; upon land, upon loans, upon stock, etc., etc.; but the subject-matter once fixed, the rule is general, and applies to all property within its provisions. So it may relieve certain species of property from taxation, as the tools of the laborer, the churches of religious societies, etc.; but upon the non-exempted estate the taxation must be uniform as the exemptions are uniform. It cannot be pretended that it would be constitutional to impose a tax on a church in A., and to exempt one of the same character in B.; to say that all or a part of the farms in the former shall be subject to a tax, while those in the latter shall be free from taxation. But if it be conceded that each town has the right to tax part and exempt part of the property located therein, whatever its character, uniformity in relation to the subject-matter, as well as to the ratio of taxation, is at an end.

If, of the innumerable varieties of manufacture, different towns exempt different, or the same species of manufacture, the utter want of uniformity is obvious. The cotton manufacturer in one town is exempt, while in the next the woolen manufacturer pays his proportional share of the public burden. Nor is this all — if the same kind of a manufacture has been heretofore carried on as is proposed to be exempted from the payment of taxes, then in the

Brewer Brick Co. v. Inhabitants of Brewer.

same town, in case of exemption, will be seen the remarkable spectacle of two manufacturers, engaged in the same industrial pursuits, the one with his capital freed from all public burdens, the other bearing his just and proportional share. The larger the investment of exempted capital, the heavier the burden upon the non-exempted capital. Of two competing capitalists, in the same branch of industry, one goes into the market with goods relieved from taxes, while the goods of the other bear the burden. One manufacturer is taxed for his own estate and for that which is exempted, to relieve his competing neighbor, and to enable the latter to undersell him in the common market; and that is precisely the relation these plaintiffs bear to their competing brick makers; a grosser inequality is hardly conceivable!

Nor is there any conceivable benefit to any one from this injustice. The town voting the exemption will be one in which the proposed manufactures thereby to be exempted could, or could not, be advantageously carried on. If the former, the very principle of self-interest will induce such manufacturer to establish himself in the town so voting, without inducement of such vote. It would, then, be the necessary giving of money to one whose interests would be promoted by manufacturing in the place in question. It would be compelling the rest of the inhabitants to add to the gains of a capitalist without participation therein. If otherwise, and the town so voting is an injudicious place for the location of the manufacturers to be exempted, it is an invitation to the manufacturer to engage in a losing business with a proffer to bear the loss to the extent of the exemption. The exemption is either unnecessary or unwise.

The plaintiffs have only paid their proportional share of the taxes in the defendant town according to its valuation. The plaintiffs are not entitled to recover. To permit them to do so would be to approve unconstitutional taxation for private purposes and to sanction a system which would destroy all uniformity as to the property upon which taxes are to be imposed, and all equality as to the ratio, so far as regards the valuation. It can never be admitted that the constitution of the State permits or allows the taxation of a portion of its citizens for the private benefit of a chosen few, and that the taxes raised for such a purpose shall be assessed without reference to uniformity of taxable property, or equality of ratio.

Hanson v. European and North American Railway Co.

It becomes, therefore, entirely unnecessary to consider whether or not the plaintiffs are within the provisions of the statute or the terms of the vote under which they claim exemption from taxation.

Plaintiffs nonsuit.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

CUTTING, J., concurred in the result.

PETERS, J., having been of counsel for plaintiffs, did not sit in this case, but he concurred in a similar opinion and result in *Andrews v. Oxford*, involving precisely the same question.

HANSON V. EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY.

(88 Me. 64.)

Carrier — Liability of, for assaults of servants on passengers. Exemplary damages. Excessive damages.

Passenger carriers are responsible for assaults and batteries committed by their employees upon passengers. (*See note, p. 409.*)

Plaintiff entered defendant's car as a passenger, his dog accompanying him.

While the train was in motion, a brakeman attempted to eject the dog but was forcibly prevented by the plaintiff. Afterward, the brakeman suddenly attacked plaintiff, inflicting upon him serious injuries. On the trial of an action of trespass therefor against the company, the court charged that if the brakeman "was acting in the performance of his duty as brakeman, he would be justified in using a reasonable degree of force, necessary and proper to accomplish the removal of the dog from the car, but if he used more violence than was necessary, and inflicted on plaintiff blows that were unnecessary to perform his duty, the company would be liable, and the jury may, in that case, award punitive or exemplary damages." *Held*, correct. The jury returned a verdict for plaintiff of \$4,000. *Held*, that the damages were not so clearly excessive as to justify the court in setting aside the verdict on that ground.

Hanson v. European and North American Railway Co.

TRESPASS for injuries received at the hands of one Foster, a person in the employ of defendant as brakeman.

The plaintiff testified that he entered a car on defendant's road, upon the 22d of March, 1871, intending to go to Bangor; that his dog entered with him, without caution or objection from any one. Soon after the car started, the brakeman, Foster, discovered the dog; said it was no place for him and that "he must go off this car," at the same time taking hold of him and dragging him out into the aisle; that plaintiff thereupon said if he would wait till they arrived at Winn, he would take the dog off himself, but that he could not let the dog be put off while the train was in motion; that when he first addressed Foster, he clapped his hand on F.'s shoulder, saying, "my friend, what is the trouble?" to which F. replied, "the dog must go off;" that, upon the plaintiff's repeating that the dog could not be removed while the train was moving, Foster rose right up and grabbed Hanson by the breast; whereupon he took F. by the shoulder and set him down on a seat running parallel with the side of the car, and told him to sit there; that F. drew his feet up and kicked plaintiff, breaking the pane of glass behind him in doing so, but not releasing himself; that F. asked who was going to pay for that glass, and H. said F. should; that F. then asked H. to let him up, and plaintiff said he would, if F. would behave himself; and on his saying he would, the plaintiff permitted him to rise, and turned round to go and resume his own seat; when, while his back was toward F., he suddenly received severe blows with a poker (which F. had taken from the other side of the car, where it lay by the stove), about the head and shoulders, one being directly over the eye; which blows constituted the assault and battery, for which this suit was brought. Plaintiff's evidence was corroborated by other witnesses.

The medical testimony was that Mr. Hanson had a severe wound upon the temple, and two more upon the top of his head, the external table of the skull was cracked, and his eyes badly affected, indicating danger of palsey of the optic nerve and entire loss of its functions.

Mr. Foster, as witness for the defendant, testified that he asked for the owner of the dog, and that he (the owner) should remove the animal, but nobody answered, so he (witness) was about to take him into the baggage car, when Hanson came up and told him to let the dog alone; that the dog should not go out of the car

Hanson v. European and North American Railway Co.

committed by their employees upon passengers. *Bryant v. Rich*, 106 Mass. 180, where the case of *Goddard v. Grand Trunk Railway Company*, 57 Me. 202; S. C., 2 Am. Rep. 39, is cited, and the carrier's liability, as there declared, approved.

This responsibility of course rests upon the assumption that the battery cannot be justified. If it can be, no responsibility attaches to any one. If it cannot be, both the servant and the carrier are liable.

If the servant is first assaulted, he may defend himself. If he is resisted in the performance of any duty, he may use force sufficient to overcome the resistance. But the assault being over, or the resistance ended, he cannot pursue and punish the wrong-doer.

The rule applicable to such cases is this, that when a *prima facie* case of assault and battery is sought to be justified, it is incumbent upon the one who justifies, to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and reasonable in degree, otherwise the justification fails. *Rogers v. Waite*, 44 Me. 275; *Brown v. Gordon*, 1 Gray, 182; *Com. v. Clarke*, 2 Metc. 23; 2 Greenl. Ev., § 98.

It is the duty of the conductor, and other employees upon a train of cars, to treat the passengers with civility, and to abstain from all unnecessary violence toward them. It is also the duty of passengers to observe the rules and regulations of the company, and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence.

But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance, and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance.

Nor is it true that an uncivil word by a passenger at the beginning of his journey will justify the carrier's servants in treating him with insolence to the end of it. Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the resistance is over. If he does, he makes the carrier as well as himself liable for the injury.

Hanson v. European and North American Railway Co.

If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his resistance, and was returning to his seat with his back to the brakeman. Under the instructions of the court the jury must have so found, or they could not have returned a verdict for the plaintiff; and in our judgment the evidence fully justified the finding.

Nor are we satisfied that the damages assessed by the jury are so clearly excessive as to justify us in setting aside their verdict. It is true that the damages are large, but it is equally true that the injury was a very severe one.

The right of the jury to give exemplary damages in this class of cases was first declared in this State in *Pike v. Dilling*, 48 Me. 539. The whole doctrine of exemplary damages was again fully and carefully examined in *Goddard v. Grand Trunk Railway Co.*, 57 Me. 202; S. C., 2 Am. Rep. 39, and its application to railroad companies for the willful and malicious acts of their servants, affirmed. It is not now an open question in this State, and will not be further discussed.

We think the case was submitted to the jury upon correct principles of law, and that their verdict is neither against law, nor the weight of evidence; nor are we satisfied that the damages are so clearly excessive, as to justify us in setting the verdict aside on that ground. The verdict must therefore stand.

Motion and exceptions overruled.

APPLETON, C. J., CUTTING, DICKERSON and BARROWS, JJ., concurred.

PETERS, J., having been of counsel, did not sit.

NOTE. — In addition to the cases cited see *Passenger Railroad Co. v. Young*, 8 Am. Rep. 78; *Bryant v. Rich*, id. 811; *Sherley v. Billings*, id. 451; *Jackson v. The Second Avenue R. R. Co.* 7 id. 448. — RMP.

SMALL V. CLEWLEY.

(22 Me. 284.)

Burden of proof as to consideration of promissory note.

In an action on a promissory note between the original parties thereto, where a want of consideration is relied upon as a defense, and evidence is given on the one side in the affirmative and on the other in the negative, of the fact of consideration, the burden of proof is on the plaintiff to satisfy the jury upon the whole evidence of that fact.

ASSUMPSIT upon two promissory notes, alleged to have been made by the defendant's testator. The opinion states the case. The plaintiff had a verdict for the amount of one of the notes, and the defendant excepted.

A. G. Jewett, F. Nickerson and N. H. Hubbard, for defendant.

N. Abbott, for plaintiff.

PETERS, J. The plaintiff, as payee, sues the executrix of the maker of two promissory notes. The grounds of defense, taken by the defendant, seem to have been that the notes were forged; or, if genuine, that they were obtained without a valuable consideration therefor. The parties did not testify; no witnesses to the original transactions were called; the evidence is mostly circumstantial and somewhat indefinite, and was introduced by both sides upon the issues involved.

The judge presiding said to the jury, "if you find that the signature is genuine, the burden is upon the defendant to show he should not pay it;" — "if you are satisfied that those signatures are genuine, then the presumption of law is, that the notes were given at the time they purport to have been given, and for a valid consideration, and the plaintiff is entitled to judgment for the amount and interest on the notes, unless the defendant, taking the burden upon herself, has satisfied you that there is some legal reason why she should not pay them. It is incumbent upon the defendant to satisfy you by a balance of testimony, if you find that the signatures are genuine, that she has some ground for being discharged from liability."

Small v. Clewley.

The effect of the instruction was to impose the burden of proof upon the defendant, to show that there was a want of consideration for the notes; and in this respect the instruction was erroneous. In one sense a burden of proof would be upon the defendant; a particular burden, to rebut the *prima facie* case made by the production of a genuine note; but the general burden of proof was upon the plaintiff to show a consideration for the notes, and that burden does not shift. The weight of evidence may preponderate on the one side or the other, but the burden of proof remains on the plaintiff, unless the defendant sets up a new and distinct issue, as payment, for instance, confessing the original contract, and seeking to avoid it. Here the plaintiff declares, in his writ, that the notes were given for value. If not so given, they were not contracts upon which the defendant could be legally held. The plaintiff is required to prove this essential allegation. He can rely on the presumption which arises from the note itself. But there being other evidence on both sides, which has a bearing upon the question of consideration, the burden remains upon the plaintiff upon all the evidence produced, including the note itself and the presumption that arises from it, to establish what he, in the declaration in his writ, has necessarily alleged.

The same question arose in *Delano v. Bartlett*, 6 Cush. 367, where it is said: "It was incumbent on the plaintiff to prove a consideration for the note, which was the foundation of the suit. That was a part of her case, and the burden was on her to establish that fact. But the note itself was *prima facie* evidence of a consideration, so that, by producing the note, the plaintiff made a *prima facie* case. That evidence, if not rebutted, would be sufficient to maintain the plaintiff's case. But it was competent for the defendants to rebut the evidence on the part of the plaintiff, and thus to avoid the *prima facie* case made by her. Accordingly, the defendants did offer evidence to rebut the evidence on the part of the plaintiff, and to show that there was no consideration. The evidence on both sides applied to the affirmative or negative of the same issue or proposition of fact, a consideration for the note, and the plaintiff's case requiring her to show that fact, the burden of proof was all along on her to satisfy the jury, upon the whole evidence in the case, of the fact of a consideration of the note."

In *Powers v. Russell*, 13 Pick. 76, Chief Justice SHAW says: "Where a party having the burden of proof establishes a *prima*

facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such *prima facie* case, must produce evidence of equal or greater weight to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate."

In a note to the case of *Commonwealth v. McKie*, 1 Leading Criminal Cases, by Bennett & Heard, the editors clearly express the legal proposition in this way: "The production of a note written by the defendant, containing the words 'value received,' is equivalent to proving an admission of his, that there was an original consideration for the note, and nothing more. It is a *prima facie* evidence of a consideration, sufficient, if not rebutted, to maintain the plaintiff's case. But to hold that such an admission in the note of a consideration therefor changes the burden of proof, and compels the defendant to assume it, would be to hold that such an admission, when made orally, and when not contained in the instrument, would have the same effect."

Other authorities are to the same effect. *Noxon v. De Wolf*, 10 Gray, 343; *Estabrook v. Boyle*, 1 Allen, 412; *Crowninshield v. Crowninshield*, 2 Gray, 529; *Burnham v. Allen*, 1 id. 496; *Smith v. Edgeworth*, 3 Allen, 233; *State v. Flye*, 26 Me. 812; *Tarbox v. Eastern Steamboat Co.*, 50 id. 339; *Bourne v. Ward*, 51 id. 191.

In *Sawyer v. Vaughan*, 25 Me. 336, it is stated that the burden of proof would be upon the defendant to prove a failure of consideration of a note. In *Delano v. Bartlett*, 6 Cush. 368, before cited, a distinction is made in respect to the burden of proof, between a want of original consideration and a failure of it; while in *Burnham v. Allen*, *ubi supra*, no such distinction is taken by Chief Justice SHAW. If no distinction exists, the statement by SHEPLEY, J., in *Sawyer v. Vaughan*, if he intended to convey the idea that the defendant would be required to show more than enough to control the *prima facie* case made by the note, which he probably did not, would be erroneous. A later case in this State, *Quimby v. Morrill*, 47 Me. 470, evidently received very little consideration, so far as this question was concerned, and so far as contradictory to the construction established in the present opinion, is, both upon principle and the precedents, unsustained.

It might be regarded that the instruction in this case was not given in the strict and technical sense of the meaning of *onus probandi*; and that the burden alluded to was merely a requirement to nullify the effect of the plaintiff's *prima facie* case, were it not that the defendant was required to show the grounds of her discharge from liability by a balance of testimony; which would seem to imply, and might be so regarded, as requiring more rebutting evidence by the defendant than sufficient to nullify the value of all that the plaintiff had produced, and so that the defendant would be held, even if, upon all the testimony of both sides, upon the disputed proposition, it was left uncertain whether there was any consideration for the notes or not. The defendant would thus be held, even if the scales of evidence were *in equilibrio*. He would be required to produce evidence not only equal to, but greater than the weight of all presented by the plaintiff. He would have to satisfy the jury not only that upon the whole evidence no consideration for the note was proved, but that none existed. He was required not only to control and overturn the presumption created by the note, but to proceed further, and prove the negative of a proposition, the affirmative of which was upon the other side. In *Burnham v. Allen*, 1 Gray, 501, *ubi supra*, the court say: "As the burden is on the plaintiff to prove a good consideration (for the note), if the whole evidence, offered on both sides, leaves it in doubt whether there was a good consideration or not, the plaintiff fails of making out his case, and the defendant will be entitled to a verdict."

Although it might not be incorrect, ordinarily, to say, in general terms, that a production of a note would cast the burden of proof upon the maker of it to show some defense to it, a somewhat common but inaccurate use of the phrase — meaning no more than that it would be incumbent on a defendant to offer evidence to impeach and overcome a *prima facie* case, still the rule given in the terms and under the aspects of the case as presented here, must be regarded as erroneous. The notes were surrounded with suspicion. Next to no evidence of a direct character was produced, throwing any light or explanation upon the transactions. It was peculiarly a case, where an accurate and exact statement of the rule, as to the burden of proof, would have been valuable to the defendant, and she was entitled to it.

Exceptions sustained.

APPLETON, C. J., CUTTING, WALTON and BARROWS, JJ., concurred.

STRINGER V. COOMBS.

(20 Me. 166.)

Damages—contracts payable in foreign coin. Execution.

The defendant agreed in England, to pay the plaintiffs a commission of five per cent on the charter of a vessel hired for thirty-three thousand three hundred dollars in hard Spanish dollars, i. e., \$1,665. *Held*, that the brokerage should be paid in coin of the United States, equivalent to that sum in hard Spanish dollars, with interest from the day it was payable; and that execution should issue specifically for the coin.

THE plaintiffs, at London, England, procured the defendant's vessel to be chartered for a round voyage at \$33,300, to be paid in hard Spanish dollars, for which he is conceded that they are entitled to a commission of five per cent on that amount, the only question being whether this \$1,665 should be paid in currency or in hard Spanish dollars, or their equivalent.

Boyle & Johnson, for plaintiffs.

Wm. G. Crosby, for defendant, cited *Adams v. Cordis*, 8 Pick. 260; *Lodge v. Spooner*, 8 Gray, 166.

APPLETON, C. J. The plaintiffs procured a charter-party on the *Live Oak*, a vessel of which the defendant was master and part owner. The vessel at the time was lying in the port of Cardiff. The defendant executed and delivered the plaintiffs on the 15th of April, 1866, the following agreement:

“LONDON, 15 April, 1866.

“Messrs. Stringer, Pembroke & Co.,

“8 Austin Friars, London.

“Gentlemen:

In consideration of your having procured a charter for the ship ‘*Live Oak*’ from the Chincha Islands to Spain, hereby undertake to pay you a brokerage of five per cent. on the estimated amount of chartered freight—ship lost or not lost; such brokerage being

Stringer v. Coomba.

due on the signing of the charter-party, but if not then paid, may under your order be deducted by the consignee from the freight upon settlement.

"Gentlemen, yours respectfully,

"R. H. COOMBA."

By the charter-party the freight was to be paid at the rate of eighteen hard Spanish dollars per ton of 2240 lbs. English, etc.

The English currency is in pounds, shillings and pence. The amount due was to be ascertained by reference to the value of hard Spanish dollars. Neither German, Mexican or American dollars can be referred to as the measure of value. They may differ in value from the hard Spanish dollar, which was agreed upon and which alone would satisfy the terms of the charter.

The contract was made in London, and the parties must be governed by the law of the place. The plaintiffs were there entitled to five per cent of the freight, computed at the rate specified in the charter-party. Their claim could only be satisfied by the payment of one-twentieth of the freight, reckoned according to the terms of the charter and payable in London. If the debt is paid here, the plaintiffs should receive what their five per cent was worth at the time when, and the place where, it was payable, in the currency of this country, and interest. Nothing less would be just or would be a full compensation. In the case of a debt contracted in England, in the absence of any understanding to the contrary, the debt is held due and payable there. "This being so," observes THOMPSON, C. J., in *Benners v. Clemens*, 58 Penn. 24, "it was payable in the legal currency of the country, denominated pounds, shillings and pence, and the representative of gold. Of course, as any payment here would be in legal-tender notes, the value of the gold in legal-tenders, with interest, would be what in amount the judgment should be. The *lex loci contractus* must control in interpreting the contract. *Allshouse v. Ramsey*, 6 Wharton, 331; *Watson v. Brewer*, 1 Barr, 58." These views were fully sustained by Mr. Justice COCHRANE in *Marburg v. Marburg*, 26 Md. 8, where this question is very fully and ably discussed. In *Nickerson v. Soesman*, 98 Mass. 364, the suit was brought to recover damages for the non-performance of a contract to be performed in a foreign jurisdiction. In that case, the defendants refused to surrender to the plaintiffs' agent money, notes

and goods, etc., in Surinam, on demand, as by their contract they were bound to do. In reference to the rule of damages, BIGELOW, C. J., says: "They had a right to demand and receive them then and there; and for the failure of the defendants to fulfill their duty, they are entitled to such sum as will put them in the same situation as they would have been if the property had been then given up and received by them at Surinam. Clearly such indemnity would not be had, if the plaintiffs could recover only such sum in the currency of this country as is nominally equivalent to the sum which they would have been entitled to recover in the currency of Surinam. It would fall just so far short of full compensation for the injury sustained, as that sum in the current money of the United States is worth less than the same sum estimated in the currency of Surinam. The only just rule is, that in such cases the party who has suffered a loss or injury through the fault of another shall be allowed such sum, in the currency of the place where the suit is brought, as most nearly approximates to that which he would be entitled to recover in the country where the injury or loss happened and the damage was sustained." It is true the court qualify the above by the remark that "the cases in which actions have been brought on a contract to pay a sum of money in a foreign country, depend on different principles and are not applicable to transactions like that out of which the present action has arisen." But it is not readily perceived why justice should not be done as much in one case as another. All contracts when enforced by legal process are ultimately payable in money. Whether the contract be to pay a given sum of money in a foreign country or to do certain acts, for non-performance of which the injured party may recover damages in such country, cannot logically affect the compensation in way of damages to which he is entitled when seeking redress in another tribunal. Nor is it very easy to see why, if one contracts to pay a thousand dollars in a country where by the law the contract is payable in coin, the measure of damages should be other or different from those where as a common carrier he agrees to deliver a thousand dollars in gold coin. *Cushing v. Wells*, 98 Mass. 550. In each case the loss is the same if the contract is not performed, and no sound reason can be imagined why the damages for non-performance should differ.

"The proper rule," remarks Story in his *Conflict of Laws*, § 309, "would seem to be, in all cases, to allow that sum in the currency

Stringer v. Coombs.

of the country where the suit is brought, which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par, of exchange." If the currency of the country has become depreciated, then depreciation ought to be allowed for. Without that is done, justice is not done. The party to whom the debt is due fails to receive the amount which is his due. If the contract were for a specific article, the measures of which though nominally the same were really different, would any doubt that the measure in use in the country where the contract was to be performed, would be the one which is to govern in that where it is sought to be enforced? But the principle must be the same whether it applies to a measure of quantity or one of value.

As the contract was made and was to be performed in England, the legal-tender acts of the United States are inapplicable. The plaintiffs, if they were to be paid in currency, would therefore be entitled to a sum equivalent in value to the debt due at the time and place when and where it was payable.

The case of *Wood v. Watson*, 53 Me. 300, does not apply. That related to the damage where a foreign bill of exchange had been protested. As the damages in such case had been settled by a long-continued series of decisions based upon such usage, which formed a part of the law of the State equally as if determined by statute, at ten per cent, it was held, and correctly, that the rule could not be changed by reason of any monetary crisis, and that such change would be a legislative rather than a judicial act.

It is apparent, therefore, that the plaintiffs are entitled to recover the value of one-twentieth of the freight, earned and payable in London.

By the agreement of the parties "the estimated amount of chartered freight was thirty-three thousand and three hundred dollars (\$33,300), hard Spanish dollars. Upon this sum it is agreed that the plaintiffs were, in London, on the 15th day of April, 1866, entitled to five per cent from the defendant, and that said five per cent remains wholly unpaid, to recover which this action was brought."

"Five per cent of the estimated amount of chartered freight," to which the plaintiffs are entitled for brokerage, is five per cent of thirty-three thousand three hundred hard Spanish dollars. It

is neither more nor less than that amount. It is what the plaintiffs would have received had the defendant performed his contract. It has relation to the sum from which it is to be deducted, and is necessarily a portion of that sum. It would not be five per cent "of the estimated amount" if paid in a depreciated currency, or in dollars of less value than "hard Spanish dollars." Five per cent, then, would be sixteen hundred and sixty-five hard Spanish dollars, for it was to be from the freight earned, and in the hard Spanish dollars, in which the freight was payable. The defendant was indebted to the plaintiffs for that sum in hard Spanish dollars, or in coin of equivalent value. Payment in dollars of an inferior standard of value would not be a performance of the contract.

By the statutes of the United States, the Spanish dollar is equivalent in value to our silver dollar, and it is made a legal-tender for the payment of all debts and demands, at that rate by Act of Congress, passed April 10, 1806, § 1, 2 U. S. Stat. at Large, 874, ch. 22.

It is well known that legal-tender notes are of variable and fluctuating value. The plaintiffs are entitled to payment in coin, or in currency equivalent in value to the coin when and where the debt was payable. The value of legal-tender notes may change between the date of a writ and the rendition of judgment—between the date of an execution and any service thereon. If judgment were to be rendered for the amount due in the currency of the country, the plaintiffs might receive more or less than was due as the currency should oscillate in value. Accordingly, the courts of the United States have recognized the fact that there are two descriptions of lawful money under the Acts of Congress. *Bronson v. Rodes*, 7 Wall. 229; *Butler v. Horwitz*, id. 258. To avoid the fluctuations in value of legal-tender notes as compared with gold and silver coin, they have ordered, when the contract is payable in gold or silver coin or specie, that executions should issue payable in gold and silver. *Trebilcock v. Wilson*, 12 id. 687. The courts of various States, following the principles adopted and acted upon by those of the United States, have ordered similar judgments and executions. *Phillips v. Dugan*, 1 Ohio St. 466; *Independent Ins. Co. v. Thomas*, 104 Mass. 192.

By R. S. 1871, ch. 81, § 1, the Supreme Judicial Court is authorized to make, by general rules, such alterations in the forms of

Chase v. Silverstone.

writs "as changes in the law or other causes require." An execution is a writ. Authority to change a writ implies authority to change an execution issued upon a judgment rendered in a suit commenced by such writ.

The contract in the present case was to pay the freight at a certain specified rate. It can only be exactly performed by a payment according to its terms. Equivalent value will do justice.

To this end, judgment should be entered specifically for the current coin of the United States, and execution should so issue for the debt. The judgment for costs should be general, as that may be satisfied by payment of either kind of lawful money. In this way alone the payment of what is due, neither more nor less, will be enforced.

Judgment accordingly.

CUTTING, WALTON, DICKERSON, DANFORTH and PETERS, JJ., concurred.

CHASE V. SILVERSTONE.

(22 Mo. 714.)

Subterranean water—diversion of, by sinking well.

The defendant dug a well on his own land, in good faith, for the obtaining of water for his own domestic uses. *Held*, that he was not liable for any damage which incidentally resulted to the plaintiff by reason of thereby diverting the water which had been accustomed to percolate or flow, in an unknown subterranean current, into the plaintiff's spring.

CASE against the defendant for digging a well on his own land whereby the waters of a living spring upon that of the plaintiff were diverted. Neither party supposed the well would have that effect when it was dug. The plaintiff supplied his house and barn by pipes from his spring, the water flowing naturally into tanks. In sinking his well, the defendant's workmen struck a vein of water that filled the well and overflowed the yard; to dispose of the water, a drain was made a foot or two below the top of the well so as to carry the overflow to the street gutter, ineffectual

attempts having been made, in various ways, to check the flow. The result was that the plaintiff's natural supply was cut off and he had to put a pump into his spring. This spring was shown to have existed there for thirty or forty years at least.

The court were to enter such judgment as the law upon the facts required.

F. A. Pike, for plaintiff, cited *Dickinson v. Grand Junction Canal Co.*, 9 Eng. L. & Eq. 513; *Dexter v. Providence Acq. Co.*, 1 Story's C. C. 387; *Smith v. Adams*, 6 Paige, 435; *Bassett v. Salisbury*, 43 N. H. 569; *Swett v. Outts*, 50 id. 439; S. C., 9 Am. Rep. 276. In the cases of *Acton v. Bell*, 12 Mees. & W. 824, and *Greenleaf v. Francis*, 18 Pick. 117, the wells injured had not existed twenty years and were not natural streams coming to the surface.

J. & G. F. Granger, for defendant.

VIRGIN, J. This court has had frequent occasion to enunciate the rules regulating the relative rights and liabilities of riparian proprietors and apply the principle of "reasonable use" to the peculiar circumstances of each particular case; and in two cases (*Lansil v. Bangor*, 51 Me. 521, and *Grosley v. Maine Cen. R. R. Co.* 53 id. 200) have determined the rights and liabilities of land owners in relation to mere surface water. But this is the first case which has called upon us to declare the law which governs proprietors of adjacent lands in relation to sub-surface waters not gathered into a fixed, known channel.

Is a land owner, who, by digging a well in his own land for his own domestic purposes, thereby diverts underground waters and thus prevents them from percolating into a coterminous proprietor's spring to the owner's damage, liable for such damage; or, does such a diversion fall within one of those large and distinct classes of cases cropping out over the whole domain of "wrongs independent of contract," in which appreciable damage and loss are incidentally occasioned to an individual by the act of another, and yet no redress is given him by the law, and to which the law applies the phrase, "*damnum absque injuria*?"

We feel compelled by the vastly preponderating weight of authority to place the decision upon the latter alternative; and shall content ourselves with briefly alluding to a few of the principal adjudicated

Chase v. Silverstone.

cases, without any extended discussion of the principles upon which they are based.

An eminent jurist has well said that the doctrine of the civil law — *cum eo qui in sua fodiens, vicini fontem avertit, nihil posse agi; nec de dolo: Et sane actionem non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit*," or (as translated by MAULE, J., in *Acton v. Blundel*, 12 Mees. & W. 335): "If a man digs a well in his own field, and thereby drains his neighbor's, he may do so unless he does it maliciously," contains the germ of the present English and American law upon the subject, so far as that may be regarded as settled.

Such was the view of the court in *Greenleaf v. Francis*, 18 Pick. 117, as expressed by PUTNAM, J.: "By the common law the owner of the soil may lawfully occupy the space above as well as below the surface, to any extent which he pleases, in the absence of any grant, agreement, or statute of police regulation to the contrary. * * These rights should not be exercised from mere malice. * * He may obstruct the light and air above and cut off the springs of water below the surface. * * The defendant dug his well in that part of his own ground where it would be most convenient for him. It was a lawful act, and although it may have been prejudicial to the plaintiff, it is *damnum absque injuria*."

So, in *Parker v. B. & M. Railroad*, 3 Cush. 107, in discussing the relative rights of owners of lands, SHAW, C. J., on page 114, said: "Each owner of land has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*."

The first leading and most frequently cited English case wherein the rules regulating riparian rights were held inapplicable to percolating waters, is that of *Acton v. Blundel*, 12 Mees. & W. 335, decided in 1843, in the Exchequer Chamber. The plaintiff's cotton-mill was carried by water raised from a well in his own land. Subsequently the defendant sunk a coal-pit in his own land, one-half mile from the plaintiff's well, whereby the latter's supply of water was destroyed. TINDALL, C. J., after discussing the known state and condition of water in surface-channels and the well-settled rules governing riparian rights, says: "But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighbor-

ing proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well; again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. * * If the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land, in which the spring is first found, or through which it is transmitted from draining his land for the proper cultivation of his soil. * * The advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle, whilst the owner of the adjoining land may be prevented from mining metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined." The opinion concludes as follows: "We think this case, for the reasons given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within the principle which gives the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water, that the person who owns the soil may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts and drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of action."

In 1852, the Court of Exchequer, in *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282. held, that at common law, the defendants, by sinking a well upon their own premises, and thereby preventing water from percolating in its natural course into the river on which

Chase v. Silverstone.

the plaintiff's mill was situated, to his damage, were liable in an action therefor. But the same court, four years later, in *Broadbent v. Ramsbotham*, 11 Exch. 602, held, that where the plaintiff's mill had, for more than fifty years, been worked by the stream of a brook, supplied by the water of a pond filled by rain, a shallow well supplied by subterranean waters, a swamp and a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook — the plaintiff had no right, as against the defendant, to the natural flow of any of the waters. ALDERSON, B., in the opinion of the court, on page 614, says: "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at, and is flowing in, some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel."

But the English case which received the most consideration is *Chasemore v. Richards*, Clerk to Croydon Local Board of Health, 2 H. & N. 168; S. C., 7 H. L. Cas. 349. The plaintiff's mill had been propelled more than sixty years by the river Wandle having its rise in Croydon and being fed largely by the rainfall on a large territory including the town. The rainfall percolated through the ground to the river. The defendants sunk a deep well in their land a quarter of a mile from the rise of the river, and by pumping the water for supplying the town, thereby abstracted and diverted so much of the underground water which would otherwise have found its way into the river as appreciably retarded the mill. In an action for the diversion, the Court of Exchequer, in 1856, gave judgment to the defendants, upon the authority of *Broadbent v. Ramsbotham*, *supra*. The case then went to the Exchequer Chamber, where, in 1857, the judgment below was affirmed, all the judges concurring in the opinion pronounced by CRESSWELL J., with the exception of COLERIDGE, J., who delivered a dissenting opinion, basing it upon the maxim — *sic utere*, etc. The case then went to the House of Lords, where, in 1859, after solemn argument, the former judgment was re-affirmed by the unanimous opinion of all the judges summoned, and by the House of Lords,

with the exception of Lord WENSLYDALE, who hesitated to sustain, in its full extent, the doctrine of the judges.

WIGHTMAN, J., speaking for the judges in relation to the right contended for by the plaintiff, says: "It is impossible to reconcile such a right with the natural and ordinary rights of land owners, or to fix any reasonable limits to the exercise of such a right.

* * Such a right would interfere with, if not prevent, the draining of land by the owner. Suppose a man sunk a well upon his own land, and the amount of percolating water which found its way into it had no sensible effect upon the quantity of water in the river, no action would be maintainable; but if many land owners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effect of all the wells as would sensibly and injuriously diminish the quantity of water in the river, could an action be maintained against any one of them? and if any, which? for no action could be maintained against them jointly.

* * The defendant's well is only a quarter of a mile from the river; but the question would have been the same if the distance had been twenty miles, provided the effect had been the same." The opinion cites approvingly *Broadbent v. Ramsbotham*, and *Acton v. Blundel*, and overrules *Dickinson v. Grand Junc. Can. Co.* Lord CHELMSFORD held the opinion—"the principles which apply to flowing water in streams or rivers * * wholly inapplicable to water percolating through underground strata which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course. * * But the right to percolating under-ground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tank or cistern? And how far will the right to this water supply extend?" Lord ORANWORTH said if the doctrine contended for by the plaintiff should prevail, "it would always require the evidence of scientific men to state whether or not there had been interruption. * * It is a process of nature not apparent; and therefore such percolating water has

Chase v. Silverstone.

not received the protection which water running in a natural channel on the surface has always received. If the argument of the plaintiff was adopted, the consequence would be that every well that ever was sunk would have given rise or might have given rise to an action."

So, in 1860, in *New River Co. v. Johnson*, 2 E. & E. Q. B. 434 (105 E. C. L.), in an action by the respondent to recover damages (1) for preventing water from percolating underground into her well; and (2) for abstracting from the well, water which had already so percolated into or which was in it, COCKBURN, C. J., said: "As to the first ground of complaint, *Chasemore v. Richards* is an express authority that it would not constitute any cause; and as to the second ground, *Acton v. Blundel* is as plain an authority that no action would have lain in respect of that cause." WIGHTMAN, J., expressed similar views, adding that he thought *Chasemore v. Richards* decisive of both grounds, while CROMPTON, J., said: "There may be some distinction between a case of water running in a defined stream, and the present case of water merely percolating, as to which *Acton v. Blundel* shows conclusively that no action will lie; and that the only remedy of the owner of a well from which such water has been abstracted, is to sink the well deeper.

Again, in 1763, the subject came before the Queen's Bench, in *Regina v. Metropolitan Board of Works*, 3 B. & S. 808 (113 E. C. L.). A part of the prosecutor's estate was situate upon a deep bed of gravel, imbedded in a basin of clay. In the gravel bed on the lower part of the premises, there had existed, from time immemorial, a pond fed by several powerful springs at its bottom; the water, overflowing one edge of the clay-basin, formed a rivulet, which ran through the grounds and supplied ornamental ponds therein, and which was used for the cattle and for supplying the garden. The defendants, in constructing a sewer along and under a highway, cut through the gravel bed and basin of clay, at a distance from the prosecutor's premises, varying from seventeen to one hundred and fifty-three yards, the immediate effect of which was to prevent the springs there from finding their way into the pond, so that it, together with the rivulet and other ponds, became dry. The judges unanimously held that the case was "in principle not to be distinguished from that of *Chasemore v. Richards*," quoting the paragraph from Justice WIGHTMAN's opinion which we have

transcribed above, and adding—“we entirely concur in this view of the law, and consider it to be strictly applicable to the circumstances of the present case.”

Chasemore v. Richards was also recognized as sound law by COCKBURN, C. J., and the other judges of the Queen's Bench, in *Hodgkinson v. Ennor*, 4 B. & S. 229 (116 E.C. L.), decided in 1863.

Again, in 1869, in *Popplewell v. Hodgkinson*, COCKBURN, C. J., speaking for all the court, said: “Although there is no doubt that a man has no right to withdraw from his neighbor the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any reason, it becomes necessary or convenient for him to do so.” L. R., 4 Exch. Cas. 251.

This subject has been thoroughly examined in several of the States of this Union, and the doctrine of the English courts adopted. *Frazier v. Brown*, 12 Ohio St. 294; *Routh v. Driscoll*, 20 Conn. 533; *Brown v. Illius*, 25 Conn. 593; *Ellis v. Duncan*, 21 Barb. 230; *Wheatley v. Baugh*, 25 Penn. St. 528; *Haldeman v. Bruckhardt*, 45 id. 518; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 id. 469.

We are aware that a contrary doctrine has been held by a few of the most learned courts in this country, and among them that of New Hampshire. In *Bassett v. Salisbury Manf. Co.*, 43 N. H. 569, and again in *Swett v. Cutts*, 50 id. 439; S. C., 9 Am. Rep. 276, the subject was most elaborately and candidly discussed, and the cases reviewed. But we feel better satisfied with the reasoning in the cases from which we have made such liberal extracts, and the American cases, which we have simply cited, than with the views expressed by the courts holding the other doctrines; and we see less difficulties in applying the rule of *cujus solum*, etc., than that of *sic utere*, etc., to cases of this character.

The tendency of all the authorities is against the acquisition of a prescriptive right in cases of this nature, and the plaintiff's counsel has abandoned that point.

There is no satisfactory evidence in this case that the injury to the plaintiff's spring was caused otherwise than by a diversion of the underground percolating water, caused by the digging of the defendant's well. There is no evidence of malice on the part of the defendant in the digging or otherwise constructing of his well.

Abbott v. Rose.

Whether or not malice on his part would make any difference in the decision of the case, it is unnecessary for us to consider.

Our conclusion, therefore, is, that the defendant having dug his well in good faith, for the purpose of obtaining water for domestic uses, is not liable for any damage which incidentally resulted to the plaintiff, by reason of thereby diverting the water which had been accustomed to percolate, or flow in an unknown subterranean current, into the plaintiff's spring.

Judgment for the defendant.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

ABBOTT V. ROSE.

(22 Me. 194.)

Witness in action on promissory note — maker competent to impeach — forgery — alteration of note — filling blanks.

In an action upon a promissory note, by a *bona fide* holder, the maker is a competent witness to prove that he was induced to sign it by fraudulent representations that it was another and different instrument.

In an action by a *bona fide* holder against the maker of a promissory note, defendant alleged that his signature had been obtained thereto by means of fraudulent representations of the payee, that the paper which he signed was an instrument of a different character. *Held*, that if the jury should find that defendant had been guilty of negligence in signing the paper, he would be liable thereon.

In an action by a *bona fide* holder of a promissory note against the maker, defendant alleged that the note was a forgery, and his evidence tended to show that the instrument, when delivered, contained blanks unfilled, which had been afterward fraudulently filled. *Held*, that it was for the jury to determine whether the instrument was delivered as an incomplete paper with blanks to be filled, and that, if it was so delivered for any purpose, the person receiving it had implied authority to fill the blanks, and the maker would be liable thereon to a holder in good faith.

ASSUMPSIT on promissory note signed by the defendant. Defense, that the note was procured by fraud, also that it was a forgery.

On the trial, defendant's evidence tended to show that on the day of the date of the note, March 26, 1869, a man called at his house

and stated that he was introducing a "labor-saving machine," called an "improved hay loader," and desired to get up a club of eight persons in that town to introduce it; that he had already obtained four (all of whom were well known to Mr. Rose), and desired him to join, representing that he, Rose, "ran no risk; had nothing to fear and nothing to pay;" all he asked of the club was to give him the profit on one machine, which he sold for \$75.

"He said he would give a writing, if I (Rose) would sign to be one of his agents, that I should not be liable to give him any thing until I had sold a machine for \$75, and then I was to give him the profit on one machine, which he called \$50. Finally, after talking and being assured in every form that I was safe, nothing wrong about it, nothing to fear or to pay, I told him I would be one of his agents." The defendant testified that Persons then gave him what purported to be a certificate of membership of the club, and "wrote that upon the back, which was to make me secure and safe, that I had nothing to pay." The certificate and indorsement were as follows:

[3 cent stamp.]

"Receipt of Membership."

"Received of Harrison Rose, one hundred dollars, which entitles him to one share in the right of Wm. H. Elliott's improved Hay Loader, patented July 3, 1866, for the township of Greene and county of Androscoggin, for the payment of which this is a full and sufficient receipt.

"Dated March 25, 1869.

"LOWELL JOHNSON.

[3 cent stamp.]

(Indorsed.) "I hereby agree with Harrison Rose that he need not pay for the within share until he sells one machine at seventy-five dollars for said machine.

"O. F. PERSONS."

The witness continued his narrative: "After I had consented to be one of his agents, he said he wanted me to sign the club-book. It was a small account-book. He required me to sign it, and I did. While I was writing my name in the book, Persons stepped back to the opposite side of the table, and slipped a paper across the table, and said in order to complete this organization, he wanted me to sign the paper that he slipped across. There was some printing on that paper. It was a blank form; I mean not filled out with pen and ink. There were open spaces between and among the printed words. They were rather large. There

Abbott v. Rose.

was no writing on the paper before I wrote my name. I wrote my name on the paper that he passed across when he told me what the object was. I had the pen in my hand then. The instant I took my hand from the paper he caught it up, saying, 'this is nothing but an order, it don't require a stamp.' I wrote on the lower part of the paper, which was about the size of the note in suit. I signed no other paper than what I have stated; wrote my name that day on no other paper than what I have stated. I did not at any other time sign a paper of the purport of this note in suit, which I first saw when shown to me in Lewiston by Mr. Whitmore, a week ago last Saturday." On cross-examination he added: "I am sure there was no other paper to be signed to complete the transaction between us, besides the book and this agreement. When he slipped this paper across the table for me to sign, I never read a word on it. I asked him no questions about it at all. All I can say is, I was to blame for not asking him what it was for. I can read very well. I had no idea what I was signing, only what I have said. He caught it up as soon as it was signed, and said it was only an order, and did not need a stamp. I did not ask him what the order was for. He made that expression, and put it in his book. I acknowledge I was a fool. I did not ask him to let me look at it and read it, when he said it was an order. I did not think any thing particular about it till a few days afterward."

The defendant's sister testified that she was present at the interview, and corroborated his statement of the transaction.

This note was sold with others by Persons to Carr & Williams, of whom he had hired teams; they sold them all to N. M. Whitmore, who again sold the whole lot, before maturity, to the plaintiff. Carr & Williams guaranteed them to Whitmore, and he to Abbott. The note declared upon was of the following tenor, the words italicized being printed in the original, and the rest in writing:

"\$50.

GREENE, *March 26, 1869.*

"One year after date I promise to pay *O. F. Persons, or order,* fifty dollars, value received.

"HARRISON ROSE."

Indorsed, "O. F. PERSONS, without recourse." "Waiving demand and notice, N. M. WHITMORE."

The plaintiff objected to the defendant's testifying to any thing tending to impeach the note which he had signed, and permitted to be put into circulation. Among other directions, the presiding justice instructed the jury that if the testimony of the defendant and his sister in respect to it is true, then this instrument was a forgery, and this action cannot be maintained.

To the admission of the defendant's testimony, and the effect accorded to it, by the above instruction, the plaintiff excepted, the verdict being against him.

A. Libbey, for plaintiff. The defendant should not have been permitted to show fraud, until he had first affected the plaintiff with notice of it, the burden being on him (Rose) to do so. *Baxter v. Ellis*, 57 Me. 178; *Lake v. Reed*, 29 Iowa, 258, and 4 Am. Rep. 209.

The instruction as to forgery was too general, and misled the jury. The true rule, stated most favorably for the defendant, is this: If he was induced to sign the blank note by reason of the fraudulent representations of the payee, fully credited and relied upon by Rose, that it was another paper, and not a note, and in so doing was not guilty of any laches, negligence, or misplaced confidence, by reason of which he enabled the payee to fill up the blanks, and put the note into circulation,—then he was not liable.

The instructions given exclude the element of negligence altogether, and were therefore erroneous. *Putnam v. Sullivan*, 4 Masa. 45; *Fearing v. Clark*, 16 Gray, 74; *Cranston v. Goss*, 107 Masa. 439; S. C., 9 Am. Rep. 45; *Douglass v. Matting*, 29 Iowa, 498, and 4 Am. Rep. 238; *Kitchen v. Place*, 41 Barb. 465; *Whitney v. Snyder*, 2 Lans. 477; *Gibbs v. Linabury*, 22 Mich. 479, and 7 Am. Rep. 675; *Garrard v. Hadden*, 67 Penn. St. 82, and 5 Am. Rep. 413; *State Bank v. McCoy*, 69 Penn. St. 204; *Chapman v. Rose*, Alb. Law Jour. for March 8, 1873.

Baker & Baker and *W. Gilbert*, for defendant. The instruction as to fraud and the burden of proof was correct. *Aldrich v. Warren*, 16 Me. 465; *Perrin v. Noyes*, 39 id. 384; *Gould v. Stevens*, 43 Vt. 125, and 5 Am. Rep. 255.

No instruction was requested as to negligence, and it is too late to raise objection now. The necessity for this direction was not ac

Abbott v. Rose.

obvious and imperative as to require it to be given unasked. *Harpwell v. Phippsburg*, 29 Me. 313; *State v. Conley*, 39 id. 78.

A party is only liable, on the ground of negligence, upon a paper in the shape in which it leaves his hands, and not as criminally altered by another. *Holmes v. Trumper*, 22 Mich. 427, and 7 Am. Rep. 664. Here was a combination of fraud and forgery. No agency created, because no consent to what was really done. *Gibbs v. Linabury*, 7 Am. Rep. 675.

Defendant, even if negligent, is responsible only for those consequences fairly within his contemplation when he did the negligent act. *Sexton v. Bacon*, 31 Vt. 540; *McDonald v. Snelling*, 14 Allen, 290; *Swan v. Australasian Co.*, 2 Hurlst. & Colt. 188.

DANFORTH, J. This is an action upon a promissory note in the name of an indorsee, who claims as a *bona fide* holder for value, without notice of any infirmity in the note, and for aught that appears, is such. One of the defenses set up is, that the note was procured by fraud. Under these circumstances it is contended that the defendant, who is the maker, is not a competent witness to prove the fraud, until he has first shown that the plaintiff had notice of it. In *Walton v. Shelley*, 1 T. R. 296, it was decided that a party to a contract, not interested in the result of the suit, was, on the ground of public policy, inadmissible as a witness to prove fraud in its inception. Subsequently, in *Bent v. Baker*, 3 T. R. 27, the rule was held applicable to negotiable paper only, and in a still later case, *Jordan v. Lashbrooke*, 7 T. R. 601, *Walton v. Shelley* was overruled, and since that, in England, a party to negotiable paper has in no case been excluded as a witness for the reason of his being a party.

In this country the law has been differently settled in different States. In Massachusetts the question came before the courts in the early case of *Churchill v. Suter*, 4 Mass. 156, and has been discussed in many cases in that Commonwealth, and in our State since that time. *Manning v. Wheatland*, 10 Mass. 505; *Pickard v. Richardson*, 17 id. 122; *Deering v. Sawtelle*, 4 Me. 191; *Chandler v. Morton*, 5 id. 374; *Clapp v. Hanson*, 15 id. 345; *Lincoln v. Fitch*, 42 id. 456; *Baxter v. Ellis*, 57 id. 178; and perhaps some others. In all these cases, however, it will be found that the rule has not been carried beyond that of *Churchill v. Suter*, and in all the party was excluded, because the consideration of the note was

illegal, or the note void in its inception, and the witness offered was not only a party to the note, but also to its illegality, or a partaker in the wrong which rendered it void.

In *Thayer v. Crossman*, 1 Metc. 416, after a review of the authorities, SHAW, C. J., remarks, on pages 421-2: "From this view of the authorities, and assuming that the rule, as laid down in *Churchill v. Suter*, is the true rule of law in this Commonwealth, we think it will appear to be confined to negotiable bills and notes, actually indorsed and put into circulation by the witness, with a view to give them currency as negotiable securities."

In *Buck v. Appleton*, 14 Me. 289, WESTON, C. J., speaking of the case of *Churchill v. Suter*, says: "It is well known that the principle upon which that case was based has been repudiated in the country from which it was derived, and that neither this court, nor the courts in Massachusetts, have been disposed to extend it."

Does, then, the testimony of the defendant come within the rule as established by the cases referred to? We think it does not. He was not, certainly, a willing party to any wrong in the consideration, or want of consideration, of the note. His testimony now is not inconsistent with any purpose he then had in view, or any intentional act then performed. He did not, according to the testimony, sign the note for the purpose of giving it currency as a negotiable security; he did not sign it as a note, but only as a different paper, and for an entirely different purpose. The question is not, whether under his statement he is liable, but whether the facts are such that he cannot legally testify to them. As they do not proclaim any turpitude on his part, as they tend to show, not that the paper, as originally signed, was void for the purpose for which it was signed, but that it was not then, and was not intended for a note, we see no reason, grounded upon public policy or otherwise, why the testimony should be excluded. The testimony would certainly be admissible from other witnesses, and under our present statutes, and the rule established by the cases already referred to, and which we do not intend to subvert, is equally admissible from the party, unless by some previous act, inconsistent therewith, he has disqualified himself. Such previous act we do not perceive.

Another defense set up in this case is that of forgery. Upon this the instruction to the jury, to which exception is taken, was: "If the testimony of the defendant and his sister in respect to it is

true, then this instrument was a forgery, and this action cannot be maintained."

If this instrument was a forgery, it was so by virtue of an alteration, and not of its original execution. It is true the defendant testifies, substantially, that he signed it under a misapprehension, into which he was led by the acts and statements of the payee. He further testifies that "there was some printing on that paper; it was a blank form. * * * There was no writing on that paper before I wrote my name." The only conclusion to be drawn from this testimony is, that the paper was an unfinished one, to which something more was to be added to complete it. The paper at that time, then, had no validity for any purpose whatever. The case of *State v. Shurtliff*, 18 Me. 368, differs materially from this. That was a criminal proceeding, the purpose of which was to punish the wrong-doer. This is a civil action upon a negotiable instrument, and involves the rights of an innocent holder. If a forgery, it became so only by the alterations made subsequently to its delivery. These changes or additions were certainly sufficiently material to make it such. But whether so or not, might depend upon the relations existing between the parties. If the paper was delivered as a completed instrument, without authority, express or implied, to fill any blanks or make any changes, the subsequent additions would clearly be a forgery. If, on the other hand, it was delivered as an incomplete instrument with blanks to be filled, then, even if the blanks were fraudulently filled, and the instrument made different from what the signer authorized or intended, according to the case of *Putnam v. Sullivan*, 4 Mass. 45, it would not be forgery, but a breach of trust.

It becomes, then, material to know the object or purpose for which this instrument was delivered to the payee; not what the defendant might suppose the instrument itself to be; but did he deliver it with blanks which he expected to be filled? His own testimony may be entirely true, and yet the inference may be drawn, if not from that alone, certainly from that and other testimony in the case, that the instrument which now turns out to be a negotiable note was executed and delivered as an unfinished paper with blanks to be filled. The possession of such a paper, with a genuine signature, would be, at least, *prima facie* evidence of authority to fill it up. So. *Berwick v. Huntress*, 53 Me. 89; *Story on Promissory Notes*, § 37; *Fearing v. Clark*, 16 Gray, 74. By the instruc-

tion complained of, the question, whether the paper was delivered as an incomplete paper with blanks to be filled, was taken from the jury, and they were required, if they believed the defendant's testimony, to consider it, when delivered, as complete, and all subsequent filling of blanks, for it does not appear that there were any other changes, as not only without authority, but such as would render the note void even in the hands of an innocent holder. In this there was error. It is, however, said, that if the defendant is believed, whatever the condition of the paper when delivered and the authority which might be inferred from that delivery and condition, it was not delivered as a note, or for the purpose, or expectation, of having it made into a note. This may be true, but how does it affect the case? If the instrument was delivered for any purpose as unfinished, to be perfected by the person to whom it was delivered, then for such purpose such person becomes the defendant's agent, and having furnished him the means with which he has committed a fraud, however unfaithful to his trust the agent may be, the principal must suffer rather than an innocent person.

But, assuming that the payee of this note has been guilty of forgery in filling up the blanks, as he is claimed to have done, it does not follow that the defendant is free from all responsibility in the matter. By his statement, he voluntarily signed the blank out of which this note was made, supposing, it is true, that it was for a different purpose. The blank passed from his hands by his consent; a consent, perhaps, fraudulently obtained, but nevertheless a consent. That blank was such as could only be converted into a negotiable note. In it was the name of the payee, and the words "or order." When he signed it, there was nothing to prevent his reading it if he had so chosen, and it is difficult to understand how he could have observed it sufficiently to give the description he has, without knowing what it was. Under such circumstances the law presumes his knowledge of its contents. The note, then, owed its existence to some instrumentality on his part. The perfected note was the result of his putting his name to the blank; a result which might have been contemplated as the natural and even probable effect of such an act. The signature contributed to that end very materially, and that end was reached by the confidence, misplaced though it was, which he had in the payee. If, then, this act resulted from negligence, or a want of due care on the part of the defendant, however innocent he might be, he would be responsible

Abbott v. Rose.

to any person equally innocent with himself who is injured by that act. This results not only when the person committing the fraud is the appointed agent of the defendant, but where no such relation exists. In the former case the liability would attach where no negligence is imputable, and in the latter only where it is.

In *Somas v. Brewer*, 2 Pick. 184, a case which has some significance in its bearing upon this, PARKER, C. J., on page 202, states the rule with great clearness and force. He says: "It is a general and just rule, that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune."

In *Gibbs v. Linabury*, 22 Mich. 479; S. O., 7 Am. Rep. 675, which was an action upon a note delivered by the signer in ignorance of its true character and by means of fraud, it was held that the note was void even in the hands of a *bona fide* purchaser. But it was found, and made an element in the decision, that the maker signed it "under circumstances devoid of any negligence on his part."

In *Washington Savings Bank v. Ekey*, lately decided in Missouri and reported in the American Law Register for October, 1873; S. C., 51 Mo. 272, it was held that an alteration of a note after its execution, by filling a blank so as to make it draw interest, when by the agreement of parties it was to bear no interest, would avoid the note in the hands of an innocent holder. But this is inconsistent with other cases in the same State, as is shown in a note to that case in the Law Register. In *Trigg v. Taylor*, 27 Mo. 245, the note was held void, but the court says: "If, however, a bill, note or check is so negligently drawn, with blank spaces left for the addition of other words or figures, that alterations can be so made as not to excite suspicion, the loss ought to fall upon the person in fault, according to the familiar rule, that, when one of two persons must suffer by the act of a third, the one who affords the means to the wrong-doer must suffer the loss." The rule is again recognized in *Ivory v. Michael*, 33 Mo. 398. Upon this question of negligence it can make no difference that the party did not intend to deliver a note. If the delivery itself was through a want of care, the effect is equally injurious, as if the delivery was intentional but with blanks carelessly left unfilled. This doctrine is consistent with that held in a numerous class of cases in which

it has been decided that a material alteration of a note after its execution, without the consent of the maker, avoids it even in the hands of a *bona fide* holder, such as *Waterman v. Vose*, 43 Me. 504; *Agawam Bank v. Sears*, 4 Gray, 95; *Wade v. Worthington*, 1 Allen, 561; *Belknap v. National Bank of North America*, 100 Mass. 376, and many others. In these cases the note was delivered in the course of business as a completed instrument with no blank spaces unfilled and no question of a want of care in the delivery, or the form of the paper. The connection of the maker with the note, so far as any act pertaining to its validity is concerned, had entirely ended, and the confidence in and opportunities for fraud to the third party were furnished as much by the one as the other. The two parties were equally innocent, and, therefore, the only question raised was, whether the contract set up was the one into which the party had entered. In the case at bar the liability, if any, rests upon an entirely different ground. It is not claimed that the defendant entered into the contract sued, but that if he delivered the note as an undertaking on his part not finished, but to be afterwards completed, he so far made Persons his agent as to be bound by his acts to an innocent purchaser; or, if he carelessly delivered the paper with his signature attached, he thus furnished Persons the means of fraud and so would be estopped from denying his liability to a *bona fide* holder for the legitimate results of his negligent acts, and we think the jury should have been instructed in accordance with these views.

Exceptions sustained.

APPLETON, C. J., CUTTING, VIRGIN, and PETERS, JJ., concurred.

BARTLETT V. WESTERN UNION TELEGRAPH COMPANY.

(88 Me. 200.)

Telegraph company — liability for error in transmitting message — night message — condition in blank.

Plaintiff delivered to defendants, a telegraph company, in Maine, a message to be sent during the night to plaintiff's agent in Chicago, directing him to "ship ten thousand bushels" of corn. Defendants received and transmitted the message, but through an error in transmission, it read, as delivered to the agent: "Ship *one* thousand bushels." The agent bought and shipped one thousand bushels; but some days after, on learning of the mistake in the message, he purchased the other nine thousand bushels, paying ten cents more per bushel therefor, the price having advanced. The message, as delivered to defendants, was written on a blank in which it was provided that the defendants would receive messages to be sent during the night "at one-half the usual rates, on condition that the company shall not be liable for errors or delays in the transmission of delivery, from whatever cause occurring." In an action to recover the additional price paid for the nine thousand bushels, *held*, (1) that the condition exempting the company from liability was against public policy and therefore void, even though assented to by the sender of the message; (2) that the plaintiff made out a *prima facie* case by proof of the undertaking, error and damages, and that thereupon the burden of proof was on the defendants to show that the error was caused by some agency for which they were not liable.

CASE submitted for the determination of the court.

The plaintiff, on July 12, 1870, delivered to defendants a message to be sent to Hobbs & Co., their agents at Chicago, Ill., directing them to ship ten thousand bushels of corn. As delivered to Hobbs & Co., the message read *one* thousand bushels, etc., which quantity they bought on plaintiff's account, and shipped. Some days after, Hobbs & Co. received a letter from plaintiff, of the same date as the message, and then discovered the error. Under new instructions, they purchased the other nine thousand bushels needed to fill the order, paying therefor ten cents more per bushel then, the price having risen. To recover the additional \$900 so paid, this action was brought. Defense, that the dispatch was written and delivered to the company upon a blank of this tenor, and upon the conditions therein specified, to wit: —

Bartlett v. Western Union Telegraph Co.

"No 45. "HALF RATE MESSAGES.

"THE WESTERN UNION TELEGRAPH COMPANY will receive messages for all stations in the United States east of the Mississippi river, to be sent during the night at ONE-HALF THE USUAL RATES on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender.

"No claim for refunding will be allowed, unless presented in writing within twenty days.

"O. H. PALMER, Secretary. WILLIAM ORTON, President."

"GARDINER, ME., July 12, 1870.

"Send the following message subject to the above terms, which are agreed to.

"To J. B. HOBBS & Co., Chicago.

"Ship us ten thousand bushels choice No. 2 (two) high-mixed corn.

"BARTLETT & WOOD."

"11 pd. 123, R. D. & A. 7-15 P. M."

Baker & Baker, for plaintiffs. The stipulations upon the defendants' night-message blanks are unreasonable and void. *True v. Int. Tel. Co.*, 60 Me. 9.

The measure of damages is the difference between what the corn cost on the day the first thousand bushels were bought, and its cost when the rest of the order was filled, after discovery of the error. 60 Me. 9; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Rittenhouse v. Ind. Tel. Co.*, 1 Daly, 474.

Bradbury & Bradbury, for defendants. The paper upon which the plaintiffs wrote their message, and signed it, contained a contract, and the fact that it was partly in print is immaterial. *Lewis v. G. W. Railway*, 5 Hurlst. & Norm. 867; *Breese v. U. S. Tel. Co.*, 45 Barb. 274; *French v. Buffalo*, 4 Keyes (N. Y.), 108; *Rice v. Dwight Co.*, 2 Cush. 80; *W. U. Tel. Co. v. Carew*, 15 Mich. 524, *Squire v. N. Y. Cent. R. R. Co.*, 98 Mass. 239; *Grace v. Adams*, 100 id. 505; *Camp v. W. U. Tel. Co.*, 1 Metc. (Ky.) 164; *Wolf v. W. U. Tel. Co.*, 62 Penn. St. 83.

Bartlett v. Western Union Telegraph Co.

The defendants' liability is purely matter of contract. *Playford v. U. K. Tel. Co.*, 10 Best & Sm. 759.

They are not common carriers. See cases cited *supra*; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Leonard v. N. Y. Tel. Co.*, 41 N. Y. 571; *Birney v. N. Y. Tel. Co.*, 18 Md. 341.

If they were, they could limit their liability. *York Co. v. Cent. R. R. Co.*, 3 Wall. 107; *Bissell v. N. Y. Cent. R. R. Co.*, 24 N. Y. 442; *Dove v. N. J. Steam Co.*, 1 Kern. (N. Y.) 483.

The limitations upon this blank are reasonable and proper. See cases cited *supra*; *McAndrew v. Tel. Co.*, 33 Eng. L. & Eq. 180; *Mann v. W. U. Tel. Co.*, 37 Mo. 261; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 256; *Ripley v. Atina Ins. Co.*, 30 id. 136; *Roach v. N. Y. & E. R. R. Co.*, 30 id. 548.

DANFORTH, J. On the 13th day of July, 1870, the plaintiffs left with the defendants a message to be sent from Gardiner to Chicago, by night, directing the purchase of ten thousand bushels choice No. 2 high-mixed corn. As received by the persons to whom it was addressed, it read one thousand instead of ten thousand bushels.

In consequence of this error a loss ensued, which the plaintiffs claim the defendants are legally liable to make up to them.

Upon the blank used we find printed a provision as follows: "The Western Union Telegraph Company will receive messages for all stations east of the Mississippi river, to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender.

"No claim for refunding will be allowed, unless presented in writing within twenty days."

Then follows next above the written message, the words: "Send the following message subject to the above terms, which are agreed to."

It is now contended that this provision, either as a rule established by the company, or as a contract entered into by the parties, relieves the defendants from all liability in this action. If the condition is of binding force, either as a regulation or contract, such clearly

Bartlett v. Western Union Telegraph Co.

would be its effect. The signature of the plaintiffs, obtained without fraud, would be conclusive proof of their knowledge of it as a rule, whatever it might be in regard to their assent to it as a contract.

That a telegraph company may make all proper and needful rules to enable it with convenience and dispatch to do the business of its customers, is now unquestioned. This may be done even without the consent of those doing business with it; knowledge alone being sufficient to bind them. With a contract it is entirely different; that can be binding only upon those who assent to its terms.

It has been held in many cases that a company may make rules limiting its liability in certain cases, and perhaps it is now too late to deny this proposition, though it seems to be materially enlarging the meaning of the term, when a power given to a corporation or an individual to regulate the manner or method of doing business with the public is converted into a means of limiting the liability which by law is attached to that business. But, however that may be, all courts agree that a rule to be of binding force must be reasonable, whether its purpose is to facilitate business or limit liability. There may be a wide disagreement as to whether any given rule is reasonable, but none, it is believed, as to its want of validity, when its unreasonableness is once conceded.

In *True v. International Telegraph Company*, 60 Me. 9; and S. C., 11 Am. Rep. 156, a rule similar to the one now in question was held to be unreasonable and therefore void. After a careful re-examination of that case, and the reasoning upon which it is founded, we see no reason for changing the conclusion there reached. It is claimed that this case differs somewhat from that. This is true as to some of the facts, but not as to the principle of law applicable. So far as the rule goes, it is in effect the same, or if in any thing different, the one now before us is more clearly unreasonable. While it was possible to construe the former so as not to include exemption from damages, arising from the neglect of the company, or want of skill or care on the part of the employees, the language of the latter will admit of no such meaning.

To prevent any possibility of such an interpretation, we find inserted the words "from whatever cause occurring." Then as to the facts, in the former case, there was no delivery of the message, and no reason given for its non-delivery, while in this case an effort

Bartlett v. Western Union Telegraph Co.

seems to have been made to transmit the message, and one was delivered though materially different from that sent. It is claimed that, in this respect, there is such a difference between the cases, that the two cannot rest upon the same principle. Some of the cases seem to countenance this view on the ground that a neglect or refusal to perform or to enter upon a performance, presents a question very materially differing from any that can arise on an error or mistake in performing. But the rule itself makes no such distinction. The error in transmission and non-delivery are put upon the same ground; and absolute exemption from liability in each case provided for, whatever may be the cause producing it. Now, it is very clear that negligence may be quite as injurious in the one case as in the other. It may often be that an erroneous message delivered, will cause more damage than non-delivery, and if the company, for any reason, choose to suppress the information sent, it is quite as easy to do it by forwarding a different message, as by suppressing it. It is because of its broad provisions covering every case of non-fulfillment of duty, under the law, that we declare the rule unreasonable.

In a case like this, where a party has assumed a public or *quasi* public employment, one which has become a commercial necessity, and to which business people must necessarily, more or less, resort, and in which they must trust entirely to servants, in the selection of whom they have no voice whatever, it would seem that there could hardly be a difference of opinion, as to the unreasonableness of a rule which opens so wide a door for the immunity of negligence, if not of fraud. Though it may admit of serious doubt, whether public policy would permit persons or companies occupying the relation to the business community which the defendants in this case do, to limit in any degree the liability imposed upon them by law, in view of the many decisions from courts of the highest respectability allowing it, we do not wish to be understood as denying it, nor, indeed, have we any occasion to do so in this case.

We are not unmindful that many cases have been cited, and relied upon, as supporting the binding force of the rule invoked by the defendants in this case, and some of them apparently (perhaps really) do so, while quite as many of them may be explained consistently with, if not directly sustaining, the view which we have taken. They all so construe the rule passed upon, as not

Bartlett v. Western Union Telegraph Co.

exempting from, or limiting, the liability imposed by law, arising from a want of the requisite skill or care, and in most or all of the cases such a construction flows naturally enough from the language used, while no such meaning can be given to the one now under consideration. It is true it might be held applicable to such cases as come within the authority of the company to limit their responsibility, and inapplicable to damages arising from negligence or fraud. But in so doing, we must necessarily expunge a portion of the words used, and thereby establish for the company a rule materially different from that ordained by themselves. We can only construe rules and contracts, and not make them.

It will be noticed that the rule of these defendants in relation to night messages, that which we are now considering, has no provisions for repeating the message, a provision upon which many of the cases rest. Such are the cases of *Camp v. W. U. Tel. Co.*, 1 Metc. (Ky.) 164 (Allen on Telegraphs, 85); *McAndrew v. The Electric Tel. Co.*, 17 C. B. (3 Allen, 38); *Breese v. U. S. Tel. Co.*, 45 Barb. 274 (Allen, 663). Hence in these cases and others of the like kind, the precise question now before us was not raised.

The same provision is found in *Ellis v. American Telegraph Company*, 13 Allen, 226, and also the further provision pledging the company to good faith in their endeavors "to send messages correctly and promptly," thereby authorising, and even requiring the construction put upon the rule that it did not provide against want of skill or care, and while in that view the rule is held to be reasonable, it is said in the opinion: "Of course, a party cannot in such way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents. Nor can he escape all liability or responsibility in the performance of the service or duty which he undertakes."

Warren v. Western Union Telegraph Company, 14 Mo. 472, is founded upon the same provision requiring the message to be repeated, and holds also, that the rule does not, and cannot, exempt the company from the consequences of gross negligence.

Sweatland v. Ill. & Mo. Tel. Co., 27 Iowa, 432; 1 Am. Rep. 36, is to the same purport. In this last case, DILLON, C. J., remarks: "The considerations mentioned by the appellants are quite sufficient to justify the court in holding reasonable the condition as to repeating messages, and exempting it from liability for mistakes in

Bartlett v. Western Union Telegraph Co.

unrepeated messages, occasioned by unavoidable or uncontrollable causes, provided proper instruments have been used, and proper care and skill exercised by the company's employees to avoid or prevent mistake."

Again, he says: "But I deny that companies can adopt general printed rules, exacting as a condition of sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments, or by the want of proper skill in the operators, or by their failure to use due care."

To the same effect is *Hedfield on Railways* (3d ed.), 244. In *Shearman & Redfield on Negligence*, § 565, near the end, it is said: "We certainly think that such rules should be held void; and being illegal in their terms and plain import, they ought not to be given effect, even in those cases which might lawfully be provided for, and which are covered by their terms."

Thus most, if not all, the cases upon this subject refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion, on the ground that owing to the liability to error, from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated; the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and as the person sending the message is presumed to be the best judge of its importance, he must on his own responsibility make his election whether to have it repeated. These cases also hold with great, if not entire, unanimity, that even under such circumstances, the company can only limit, but not take away their entire liability. If the doctrine of these cases be sound, the rule invoked in the case at bar must necessarily, as a rule, be void. In its very terms it relieves the company from all liability for any errors, delays, or omissions, "from whatever cause occurring."

But it is elaborately, as well as ably, argued in the defense, that here is a contract, fairly and intelligently entered into by the parties, and by the terms of that contract their rights and liabilities must be governed. While we concede that a party may sometimes limit his liability by special contract beyond what he can by a rule or regulation, yet it is settled, on a foundation too firm to be shaken, that even contracts in violation of good faith and public policy

Bartlett v. Western Union Telegraph Co.

cannot be sustained. The interests of the public must be protected, even though they clash with those of private individuals.

These defendants are holding at least a *quasi* public employment. As such they will not be permitted to compel individuals to assent to contracts inconsistent with the public interest, or which tend to excuse the want of entire fidelity in the exercise of such employment. If, then, the objection to the rule is that it relieves the defendants from obligations imposed by law for the purpose of securing fidelity to the public, the same objection would lie against it as the foundation of a contract. If this be a contract, it authorizes the grossest negligence, or fraud even, with entire impunity. The courts might, perhaps, have some latitude in applying rules, but a contract must abide the terms assented to by the parties. Courts can only enforce contracts, not make them.

When we consider that, under present methods of transacting business, the telegraph has become a commercial, if not a social, necessity, and that parties having occasion to employ it can have their rights preserved only by having their messages promptly and faithfully delivered, it would seem to be self-evident that the contract invoked in the defense is utterly void.

But it is difficult to conceive on what ground it can be called a contract. While we concede that the forms of one have an existence, the substance is wanting. The parties are not in a condition to contract upon equal terms. The company holds itself out to the public as in readiness to transmit all such dispatches as may be presented for that purpose. The telegraph has created a necessity for its use. Business can be transacted without it only at a very great disadvantage. In most places there is no choice as to lines, and where there is, it is so limited that a virtual monopoly exists. On the other hand, the occasion for sending a message often comes suddenly, or with so short notice as to leave no time for deliberation, or to examine and consider the terms offered. Under such circumstances the sender seldom, if ever, reads what is printed upon the blank or gives any intelligent assent thereto.

These suggestions may, however, be considered as applicable to the proof offered to show the existence of a contract, rather than as bearing upon its validity; and admitting that it is competent for the parties to make a contract limiting the defendants' liability for errors arising from causes other than a want of proper care and skill on their own part or that of their employees, and that the

Bartlett v. Western Union Telegraph Co.

alleged contract in this case is sufficient in form and sustained by sufficient proof, we do not admit the existence of any special contract in any proper sense of the term, limiting the defendants' liability. There can be no contract unless the contracting party assumes some responsibility, or undertakes to do or perform some act. In this case, the terms of the alleged agreement impose no duty whatever upon the defendants, or if they do, by the same instrument they are absolved from all such duty and relieved from all responsibility in regard to it. To be sure they agree or propose to receive the message and send it by night, but on condition that they may send that or another, or none whatever. The same act by which they undertake to do so releases them from all obligation to perform. Interpreting the several parts of the contract as one whole, it imposes no undertaking to send the message, or if sent, that it shall go correctly.

But if it is said that there is a contract to send the message on the part of the company for a release for error, delay or failure in performance, by the sender, the case stands no better for the defense. For such a release there is no consideration, and therefore it is of no binding force. Upon this point the remarks of the court in *Candee v. Western Union Telegraph Company*, reported in 8 *American Law Review*, 374 (*see post*), in discussing the same rule now under consideration, are so forcible and conclusive, we cannot forbear quoting: "The supposed exemption is broad and sweeping, and calculated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance, or attempted performance of the contract, or for the entire failure to perform it, from whatever cause occurring. Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company, and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, assert such a doctrine."

Bartlett v. Western Union Telegraph Co.

hardship result from this rule. The means of proof are almost entirely within the power of the defendants, and equally beyond the reach of the plaintiffs. *Shearman & Redfield on Neg.*, § 559; *Rittenhouse v. The Ind. Line of Tel.*, 44 N. Y. 263; S. C., 4 Am. Rep. 673; *DeRutte v. Tel. Co.*, *Allen's Tel. Cases*, 284.

In excuse for their non-performance, the defendants offered to show "the nature of this business; how it is carried on, and its liability to error and mistake," and other testimony to the same effect. This testimony was rejected, and in this we see no error. It is all consistent with the plaintiffs' theory that there was a want of skill or care, which caused the mistake. The difficulties of the business, its liability to error, or to be affected by the condition of the atmosphere, or that the characters used were such as might easily be mistaken one for the other, or, on account of the electrical condition of the atmosphere, liable to run into each other, may be suggestions tending to show the necessity of greater care or skill, but the proof, if admitted, would not show, or tend to show, that this error was caused by any of these difficulties, or by any cause for which the company is not liable. There is no suggestion even that it was caused by any of these agencies. In accordance with these views is the well-considered case of *Tyler v. Western Union Telegraph Company*, decided in Illinois, and reported in the *Albany Law Journal*, vol. 8, pp. 181 and 337; 60 Ill. 421; 14 Am. Rep. 38. The rule of damages is settled in *True v. International Telegraph Company*, before cited, in accordance with all the authorities.

The message was delivered in Chicago, July 13, 1870. It then directed the purchase of one thousand bushels of corn. On the 16th day of July, the error was discovered in Chicago, and the plaintiffs were notified by telegraph. On the same day, which was Saturday, they telegraphed to their agents to purchase the balance of the ten thousand bushels. What time this telegram arrived does not appear, but, from the testimony, it is fair to presume, not in season to enable the purchase to be made before Monday. It was made as soon as Monday or Tuesday. We cannot say there was any unnecessary delay, but the conclusion is, that in this respect the plaintiffs used due diligence to save themselves from loss.

The first corn was purchased for eighty-five cents per bushel; for the last was paid ninety-five, and the plaintiffs have introduced testimony tending to show that the fair market price was paid each

Bradbury v. Cony.

time. The defendants have also introduced testimony tending to show that the price paid was too high in each case. This testimony is somewhat indefinite, and relates mainly to a different kind of corn, and that of a lower grade, while that of the plaintiffs is of actual purchases, and definite proof that the price was in accordance with the then market rates. Besides the most reliable testimony of the defendants, that of Benjamin T. Howard, whose business it was to make a daily report of the market, shows an advance in the lower grade of corn from the 14th to the 18th day of July, 1870, equal, or nearly so, to that claimed by the plaintiffs. The result is, that for the nine thousand bushels of corn last purchased by the plaintiffs, they paid ten cents per bushel more than they could have bought for when their telegram first reached Chicago, and for this difference the defendants are liable, with interest from the date of the demand, July 28, 1870.

Judgment for plaintiffs for \$900, and interest from July 28, 1870.

WALTON, DICKERSON, BARROWS and VIRGIN, JJ., concurred.

BRADBURY V. CONY.

(22 Mo. 282.)

Jury — verdict set aside for improper influence used.

A verdict will be set aside if it be shown that the jury have been approached during the pendency of the cause, and information volunteered upon the matters in issue therein, by a friend or relative of him in whose favor the verdict was rendered, although such improper influence was not exerted at the request, or with the knowledge of the party prevailing before the jury. (See note, p. 454.)

MOTION for a new trial by the demandants, on the ground that the verdict against them was obtained by the effect of improper influences, brought to bear upon the minds of the jurors rendering it. The issue between the parties was as to the true location of the line dividing their conterminous estates, and the testimony as to an alleged set-off in the wall between their respect

ive buildings was conflicting. On the day the cause was argued, and before it was committed to the jury, three of the panel were upon the platform of the railroad depot in Augusta, opposite to the *locus in quo*, and accepted the invitation of the tenant's son to go across the street and examine the premises of the parties and the partition wall between their buildings, and, at his suggestion, made measurements as they went along. The foundation of the wall and the set-off were shown them, and statements relative to material facts were made by their guide, George A. Cony. The jurors testified that they were influenced by what they there saw and heard, and that it tended to induce the rendition of their verdict in favor of the defendant. There was no evidence tending to connect the tenant (George Cony) with this improper conduct of his son. The latter, while conducting the jurors from one estate to the other, said he supposed it would not do for him to be seen with them.

The controversy between these parties has been previously before this court. See 59 Me. 494. Since the present opinion was promulgated, a third trial has been had and a final judgment rendered for the demandants.

A. Libby and J. W. Bradbury, Jr., for demandants.

Baker & Baker and S. Titcomb, for tenant.

APPLETON, C. J. Every party litigant is entitled to a fair and impartial trial, without bias or prejudice on the part of jurymen, and without any interference by the opposite party, or his relatives or friends, creating or tending to create a bias, exciting or tending to excite a prejudice in the minds of those before whom the cause is tried, in favor of the party by whom, or by whose relatives or friends, such interference is had. It is immaterial whether such interference is the result of design, or of ignorance. The effect in either case is the same.

The controversy between these parties relates to the boundary line between the block of stores erected by the demandants and the Cony House built by the tenant. While the cause was on trial, the son of the defendant, the occupant of the Cony House, requested some of the jury, before whom the case was pending, to view the premises. They proceeded under his guidance to examine the

Bradbury v. Cony.

demandants' block of stores and the Cony House, making admeasurements as they proceeded, at the suggestion of their self-appointed guide. The examination had, and the measurements taken, were without knowledge of the court, or of the demandants or their counsel. This was done stealthily, the tenant's son remarking as they were going from the demandants' premises to the Cony House, "that it would not do for him to be seen with them." The jurymen testified that this examination, and the measurements made, had an influence on their verdict.

The general principles applicable to interference by a party with jurymen while a cause is pending are equally applicable to similar interference by the friends or relatives of the party in whose aid such interference is had. It was not necessary to show that the verdict was influenced by the improper conduct of the defendant's son. It is enough, that what was done by him was for the purpose and with the intention of influencing their verdict. Whenever a given course of conduct by the party litigant would induce a court to set aside a verdict, the like action on the part of his friends and relatives would be equally efficacious in producing the same result, for their interference would be more likely to influence the minds of the jury than the more obvious and apparent interest of the party. In the trial of a cause, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so, that they should be free from the suspicions of prejudice.

In *Perkins v. Knight*, 2 N. H. 474, it was held, where one of the parties, after a cause had been opened, made to a juror out of court statements favorable to his side of the cause, and the jury afterward returned a verdict in his favor, that this was sufficient cause for setting it aside. In *State v. Hascall*, 6 N. H. 353, it appeared that certain papers prejudicial to the respondent were exhibited by the prosecutor in several public places in Portsmouth, where the court was holden, during the term and before the trial, and that some of the jury boarded at those places. "We are not disposed," observed PARKER, J., "to give any countenance to such a procedure in this or in any other case. It is of much more importance that the community should feel assured of the purity of the trial by jury, without bias according to law, than it is that John Hascall be now sentenced even if he be guilty."

In *Nesmith v. The Clinton Fire Insurance Company*, 8 Abb. Pr. 141, it was proved that during the trial of an action, in which there was much conflicting evidence, a juror listened to the statements of a third party, attacking the credibility of the defendants' witnesses. The court held that, when it appears that the jury have been approached in such a manner as *might* have influenced the verdict, it should be set aside without reference to the source or the motive of the interference.

In *Reynolds v. Champlain Transportation Company*, 9 How. Pr. Cases, 7, it appeared that on the morning of the second day of the trial, and after the plaintiff had rested his case, and before the going in of the court, three of the jurors were together in a bar-room with other persons. The plaintiff, in their presence and hearing, said that the defendants were "a cut-throat corporation" — had swindled the public — that he had paid them a great deal of money — that they had defrauded him by not carrying the fruit, etc. There was a conflict of testimony as to whether the plaintiff knew they were jurymen or not. In delivering the opinion of the court, ALLEN, C. J., says: "No impropriety can be charged upon either of the jurors. They maintained a strict silence during the time the plaintiff was speaking, and left as soon as the idea of such impropriety was suggested to their minds. * * * * It is said the plaintiff said no more than had been proved in court. * * * * He charged the defendants with the grossest crimes, and in a manner calculated to prejudice the minds of the jurors. * * * * Besides, if it were strictly true that he did no more than detail the evidence, it was improper to sum up his cause out of court * * * * to the jury, or any of them." The verdict was accordingly set aside.

These views are most fully affirmed in *Cilley v. Bartlett*, 19 N. H. 312. "The case finds," observes GILCHRIST, C. J., in delivering the opinion of the court, "that the defendant, in the presence and hearing of one or more of the jury, asserted, in the most positive terms, that the testimony of one of the most material witnesses for the demandant was utterly and absolutely false. The tenant swears that he did not know any one of the jury was present at the time."

"Whether he knew this fact or not is not a matter that can be readily proved. But there will be no security for the proper admin-

Bradbury v. Cony.

istration of justice, if a party, while his case is on trial, can be permitted to make statements denouncing his opponent's witnesses, during the adjournment, after the jury have separated, whether he is aware of the presence of a juror or not. If he will conduct in this manner, he must take the risk of consequences upon himself. The presumption is, that where jurors hear such statements they are more or less affected by them. *State v. Hascall*, 6 N. H. 352. And as it is necessary that such conduct should be discountenanced, the judgment of the court is, that for this, as well as the other causes we have stated, the demandant is entitled to a new trial."

It is urged that the defendant did not know of, and is not responsible for, the illegal acts of his son. The effect on the jury is the same whether the tampering is by the party or his friends and relatives — whether with his knowledge or without it. In *Coster v. Merest*, 3 Brod. & Bing. 272, where it was proved that hand-bills reflecting on the plaintiff's character had been distributed in court and shown to the jury on the day of trial, the court refused to receive affidavits of the jury in contradiction and granted a new trial against the defendant, though he denied all knowledge of the hand-bills. In *McDaniels v. McDaniels*, 40 Vt. 364, conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, were held to constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing. "The friends of the plaintiff," remarks STEELE, J., "who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty, not only of a violation of the law, but also of the oath they had taken, to say nothing to any person about the business and matter in their charge but to their fellow jurors, and to suffer no one to speak to them about the same but in court. Both were liable to severe and summary punishment. The plaintiff, as he was unaware of their transactions, is not liable to punishment; but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful

Bradbury v. Cony.

disregard of the familiar rules which are necessary to a decent administration of justice."

Motion sustained.

WALTON, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

NOTE.—In *Everett v. Youells*, 1 N. & M. 530; S. C., 4 B. & Ad. 681, it was held that the delivery of food to a jurymen, after the jury was shut up to consider of their verdict, was no ground for setting the verdict aside, if it did not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a jurymen whose holding out decided the event.

Where, in a *quid tam* action for usury, the principal witness, the borrower, had distributed a printed memoir containing a statement of the case, which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them, it was held that the discovery of this circumstance after the trial was not a sufficient cause for a new trial. *Spenceley v. De Willott*, 3 Smith (Eng.), 321. But where a plaintiff swore that hand-bills reflecting on his character had been distributed in court and shown to the jury at the trial, the court would not receive affidavits of the jury in contradiction, but granted a new trial, although the defendant denied all knowledge of the distribution of the hand-bills. *Coster v. Merest*, 8 B. & B. 272; S. C., *nom. Coster v. Symonds*, 1 C. P. 148.

Where, by reason of an irregularity on the part of a jury, there can be no certainty that the verdict has not been improperly influenced, there should be a new trial. *Short v. West*, 30 Ind. 367. And where, on the trial of an indictment for a capital felony, the jury were so exposed to intercourse with others that they might have been subject to improper influences, the verdict of conviction was set aside. *Woods v. State*, 43 Miss. 384. But where the jury in a murder case were allowed to separate during the trial and talk with spectators in the court room, a motion to set aside the conviction was denied, affidavits having been filed that the subject of the trial was no part of their talk. *Cane v. People*, 8 Neb. 367.

A new trial will not be granted on account of idle words spoken to a juror by a by-stander, it not appearing that there was any fault on the part of a juror or of the party in whose favor the verdict was given. *Stewart v. Small*, 5 Miss. 525.

So the mere fact that a juror in a capital case has made a remark to a by-stander, or a by-stander to him, is not such an irregularity as will entitle the prisoner to a new trial. *Epps v. State*, 19 Ga. 102. But if it appear that a party has had intercourse with one of the jury after he was sworn, a new trial will be granted. *Ritchie v. Holbrooke*, 7 Serg. & R. 458.

So where a relative of the plaintiff said to one of the jurors during the trial, that the cause was of great consequence to him, and the defense of the action was a spiteful thing on the part of the defendant, a new trial was granted. *Knight v. Freeport*, 13 Mass. 218.

Where a jurymen after being charged with the case spoke to persons not members of the jury, about the evidence, and expressed his opinion to them as to the rights of one of the parties: held, that this was a serious indiscretion, but not ground for a new trial, but *semble* that it would have been, had others so addressed the juror. *Foster v. Brooks*, 6 Ga. 287. But where a juror talked

Bradbury v. Cony.

with a witness before the cause was begun and before he was called as a juror, a new trial was granted. *Mench v. Balbach*, 4 Phil. (Penn.) 68.

Where a party, while his case was on trial, in the presence and hearing of some of the jurors, declares in positive terms that the testimony of a material witness for the other side is false, a verdict in his favor will be set aside, although he swears that any of the jurors were present. *Olley v. Bartlett*, 19 N. H. 312. But a verdict will not be set aside because a witness and agent of the defendant made statements out of the court which might have been heard by some of the jurors and might have influenced them, where there was no design to so influence them, and the verdict was so sustained by the evidence. *Jones v. Vail*, 80 N. J. Law, 135.

A defendant said in the presence of some of the jury, but not knowing that they were jurors, that his "case would not be a very hard one to decide, as the plaintiff had sued him for \$500 and offered to take \$5." The court refused to set aside a verdict of \$1 for the plaintiff, there being no evidence that the jury were influenced by the remark. *Shea v. Lawrence*, 1 Allen, 167.

Where persons, not witnesses, intrude themselves into the jury-room, and converse with the jury on the subject of the suit, but the jury did not listen to their statements as evidence: held, that a new trial would not be granted. *Barbour v. Archer*, 3 Bibb (Ky.), 8.

A conversation held by one or more of the jury in a trial of felony, with a person not a member of the jury, nor having the charge of them, when unexplained, is good ground for a new trial, but otherwise. If it be shown that it had no influence unfavorable to the prisoner. *Riley v. State*, 9 Humph. 646.

An answer by the clerk of the court, publicly made, and without objection, to a question of one of the jurymen as to a particular fact on the records of the court is not ground for a new trial. *Allen v. Blunt*, 2 Woodb. & M. 121. So it is not ground for a new trial that the jury through a committee of their body communicated with the judge relative to the cause in open court, and in presence of the parties and their attorneys. *Dent v. King*, 1 Ga. 200.

The facts that the jury, after they retired to consider of their verdict, were conducted by the officer in charge to the dining-room of a hotel, where they remained together for three-quarters of an hour; that the door of the room was open and accessible to strangers, and that the officer was absent from the room for a few minutes, were held insufficient in a criminal case to justify setting aside the verdict. *People v. Kelly*, 46 Cal. 357.

If the officer having charge of a jury speaks to them, pending their deliberations on their verdict, except to ask them if they have agreed, the judgment will be set aside. *Cole v. Swan*, 4 Greene (Iowa), 32; but see *State v. Summers*, 4 La. Ann. 27; *Baker v. Simmons*, 29 Barb. 198.

And where officers, having charge of a jury said, in their hearing, that it was a worse case than A's, and that public opinion was against the prisoner, a new trial was granted. *Neims v. State*, 21 Miss. 500.

Where a jurymen is guilty of unbecoming conduct, and it is known to counsel, who permits the trial to proceed, the verdict will not be set aside in his behalf. *Martin v. Tidwell*, 36 Ga. 352.

As to the evidence of jurors on a motion for a new trial, see *Woodward v. Leavitt* (107 Mass. 458), 9 Am. Rep. 42.—R.R.

LAKE V. MILLIKEN.

(22 Me. 242.)

Nuisance — proximate cause — question for jury.

Defendants negligently piled boards in the traveled path of a highway. A stranger, passing along with a wagon loaded with barrels, ran over these boards, producing a rattling noise which frightened the plaintiff's horse, causing him to jump sideways, thereby throwing the plaintiff from his wagon and severely injuring him. The horse was well broken and carefully driven. *Held*, that on these facts, a nonsuit was error; it was for the jury to determine whether or not the defendant's acts were the proximate cause of plaintiff's injury.

CASE for so negligently placing boards on the highway, that the plaintiff, passing along the same in the exercise of the requisite degree of care, had his horse frightened by a rattling noise occasioned by a load of barrels being driven over these boards, whereby he was thrown out and severely injured; as is more fully stated in the opinion.

The presiding judge ordered a nonsuit, and the plaintiff excepted.

Baker & Baker, for plaintiff. Unnecessary that the defendants' negligence should be the sole cause of the injury. *Bigelow v. Reed*, 51 Me. 325; *Salisbury v. Herchenroder*, 106 Mass. 458; S. C., 8 Am. Rep. 354; *Br hm v. G. W. R. R.*, 34 Barb. 256; *Shearm. & Redf. on Neg.*, §§ 10, 27, 46; *Powell v. Deveny*, 3 Oush. 300; *Illidge v. Goodwin*, 5 C. & P. 190; *Dixon v. Bell*, 5 M. & S. 198; *Burrows v. March*, 5 Exch. 198; *Lynch v. Nurdin*, 1 Ad. & El. 35; *McCahill v. Kipp*, 3 E. D. Smith, 418; *Peck v. Neil*, 3 McLean, 22; *Ricker v. Freeman*, 50 N. H. 420.

It was the proximate cause. *McDonald v. Snelling*, 14 Allen 296; *Scott v. Hunter*, 46 Penn. St. 192; *Vandenburgh v. Truax*, 4 Denio, 464; 50 N. H., *ubi supra*; *Cole v. Fisher*, 11 Mass. 137; *Saxton v. Bacon*, 31 Vt. 540; *Mott v. Hudson*, 8 Bosw. 345.

This should have been left to the jury. *Lane v. Atlantic Works*, 107 Mass. 108.

It might not be expected that injury would happen in the par

Lake v. Milliken.

ticular manner it did ; but this makes no difference. *Scott v. Shepard*, 2 W. Blackstone, 892 ; *Higgins v. Dewey*, 107 Mass. 494.

A Libbey and *W. P. Whitehouse*, for defendants. The barrels did the mischief, or were the proximate cause of it. *Mott v. Hudson*, 1 Rob. 585 ; *Ryan v. N. Y. Cent. R. R. Co.*, 35 N. Y. 210 ; *Marble v. Worcester*, 4 Gray, 395 ; *Bigelow v. Reed*, 51 Me. 325.

APPLETON, C. J. This is an action on the case against the defendants, to recover damages sustained by the plaintiff in consequence of a pile of boards wrongfully placed by them in a public highway in the city of Augusta.

The case comes before us upon a nonsuit, ordered by the justice presiding, on the plaintiff's evidence. In determining whether the nonsuit was rightly ordered or not, we must assume the truth of the proof offered, and regard it in the light most favorable to him ; for the jury might have so regarded it.

It appears from the evidence that the defendants had piled their boards in a street thirty-eight feet wide ; that the space from the sidewalk to the nearest boards was fifteen feet and three inches ; that twenty-two feet and nine inches were covered more or less with boards ; that the pile was two and a half feet high and tapering ; that the boards were thrown off loosely, the defendants intending to pile them elsewhere ; that they were piled in the middle of the street ; that a wagon preceding the plaintiff, loaded with barrels, passing along, went over the boards, causing the boards and the barrels to rattle ; that the plaintiff was following in his wagon with a horse well-broken and under his control, and at a moderate pace ; that his horse, frightened by the rattling of the boards and barrels, started suddenly and too quick for him to stop him, and jumped sidewise against the lamp-post, throwing him out of the wagon, breaking his right arm and wrist, and otherwise injuring him so that he was for a long time unable to labor.

The defendants were guilty of a nuisance in thus incumbering the highway. The plaintiff was proceeding with due care. He was in no fault. A stranger passing along with a team loaded with barrels ran over the defendant's boards, piled in the middle of the street. The rattling of the boards and the barrels frightened the plaintiff's horse, which, jumping sidewise, threw the plaintiff out and severely injured him. If the boards had not been wrongfully left in

the street, they would not have rattled or caused the rattling of the barrels, and had there been no rattling of boards and barrels, the plaintiff's horse would not have been frightened nor the plaintiff injured.

The nonsuit was wrongly ordered. It was for the jury to determine whether the defendants did not have their lumber in such a situation that they might reasonably anticipate the very consequences which ensued. It was said in *Morrison v. Davis*, 8 Harris, 171, that the general rule is that a man is not answerable for the consequences of a fault, only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecasts, and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature. But here the very thing happened, which not unreasonably might have been expected; that persons driving along might pass over a pile of boards in the middle of the street, and that a rattling noise would be the result. In *Ricker v. Freeman*, 50 N. H. 420, FOSTER, J., says: "We think the principle is clearly established, that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole and immediate cause. If the defendant's negligent, inconsiderate and wanton, though not malicious act, concurred with any other thing, person or event, other than the plaintiff's own fault, to produce the injury, so that it clearly appears, that but for such negligent, wrongful act, the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible even though his negligent, wrongful act may not have been the nearest cause in the chain of events or the order of time." *Shearman & Redfield on Neg.*, § 10. "When we are engaged in an act," says the court, in *Fairbanks v. Kerr*, 70 Penn. St. 90; S. C., 10 Am. Rep. 664, "which the surrounding circumstances indicate may be dangerous to others and their interests, and when the event whose concurrence is necessary to make an act injurious, is one we may readily see may occur under the circumstances, and unite with the act to inflict an injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury."

In *Greenland v. Chaplin*, 5 Exch. 243, POLLOCK, C. B., says: "Of this I am quite clear, that every person who does wrong is at least responsible for all the mischievous consequences that may

Richardson v. Wyman.

reasonably be expected to result, under ordinary circumstances, from such misconduct." This rule was affirmed and applied in *Cranch v. Great Northern Railway*, 11 Exch. 472, and in *Mullet v. Mason*, L. R., 1 C. P. 559.

In *Fairbanks v. Kerr*, the facts were these: A man mounted a pile of flagstones in a street to make a public speech; a crowd gathered about him, some of whom got on the stones and broke them. It was held to be a question for the jury whether the defendant's making the speech in the street was the proximate or remote cause of the injury. The same principle is applicable in the case at bar.

When the injury is the result of two concurring causes, one party is not exempt from full liability, although another party was equally culpable. *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Ricker v. Freeman*, 50 N. H. 420; S. C., 9 Am. Rep. 267.

Exceptions sustained.

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

RICHARDSON V. WYMAN.

(32 Me. 280.)

Dower — when widow's claim not barred.

A husband conveyed real estate to his wife, and both united in a conveyance to F. A creditor of the husband procured the conveyances to be set aside as fraudulent, and obtained possession himself. Held, that on the death of the husband the widow was entitled to dower. (*See note, p. 462.*)

ACTION to recover dower. The opinion states the case.

A. Libbey and Samuel Titcomb, for demandant. The deeds were simple nullities and could not bar demandant's dower. *Stinson v. Sumner*, 9 Mass. 143; *Robinson v. Bates*, 3 Metc. 40. Merger of wife's interest is not looked upon with favor. *Gibson v. Craihore*, 3 Pick. 482; *Simonton v. Gray*, 34 Me. 51; *Earle v. Washburn*, 7

Allen, 95; 4 Kent's Com. 101; 2 Washb. Real Prop. 480; *Evans v. Kimball*, 1 Allen, 242; *Loud v. Lane*, 8 Metc. 518.

• *Baker & Baker*, for tenant.

APPLETON, C. J. This is an action in which the demandant, the wife of the late Amos Wyman, deceased, seeks to recover dower in certain premises of which her husband was seized during coverture.

It is in evidence that on the 13th of May, 1856, Amos Wyman, by deed of release, conveyed the premises in which dower is demanded to his wife, the present demandant, and that on the 15th of June, 1858, said Wyman and wife, by deed of warranty of that date, conveyed the same to Henry L. Fox.

It further appears that the tenant, being a creditor of Amos Wyman, by virtue of a bond bearing date July 22, 1840, commenced a suit thereon, in which the premises in which dower is demanded, were attached as the property of the debtor. The tenant recovered judgment, and the execution issued thereon was fully satisfied by a levy on the premises in controversy, and the possession thereof given the tenant. The deed from Amos Wyman to his wife, and from them to Fox, being fraudulent and void as to creditors, the tenant thereby became seized of the estate, upon which the levy was made, in fee.

Subsequently, for the purpose of removing any claim upon his title thus acquired, the tenant commenced a suit in equity against Henry L. Fox and the demandant, in which the deed of Amos Wyman to the demandant and that of said Wyman and wife to said Fox were declared fraudulent and void, and the defendants in that suit were decreed to release their interest in the premises levied upon to the tenant, except the dower of Mrs. Wyman, whose rights as doweress were not thereby to be affected. *Wyman v. Fox*, 59 Me. 100.

Amos Wyman having been seized of the premises in which dower is sought to be recovered, during the coverture of the demandant, and having deceased, she, having made due demand, is entitled to recover her dower, unless it has in some way been released, discharged, or merged in some greater estate.

The tenant relies upon the deed of release of Amos Wyman to the demandant, dated May 13, 1856, as a bar to her claim for

dower, on the ground that her right to dower is merged in the fee then conveyed to her.

The wife has only an inchoate right of dower. Her future estate is contingent upon the precedent death of her husband. The possible estate may never ripen into an actual one. The deed to the demandant, upon which the tenant relies to defeat her dower, was fraudulent and void as to creditors, and he, being a creditor, has avoided it. The deed to the demandant releasing to her the fee being avoided for fraud, the tenant would set it up as an existent estate to bar the dower to which she would otherwise be entitled. If no conveyance had been made by Amos Wyman to his wife, her right to dower would have been unquestioned. Reduced to its ultimate elements, the proposition is, that a deed fraudulent and void as to the tenant, and which has been avoided by him, may, after such avoidance, be set up by him as a valid and existing deed, for the purpose of defeating and destroying a right to which the defendant would unquestionably have been entitled, had no such deed been executed. When a lesser estate is merged in a greater, the greater estate must be assumed as valid and continuing. There can be no merger when the estates are successive and not concurrent, nor where the greater estate is void and has been avoided. In *Mallory v. Horan*, 12 Abb. Pr. (N. S.) 289, where a husband, by a deed in which his wife joined to release dower, conveyed to a third person, who conveyed back to the wife, and subsequently both deeds were set aside as being fraudulent as to creditors, it was held that the wife's inchoate right of dower was not merged in the fee conveyed to her, so as to prevent her from claiming it after the deed to her was set aside. So, in the case at bar, the tenant cannot set up one and the same deed as both valid and invalid. It having been avoided at his instance and for his benefit, it must so remain.

Neither is the demandant barred of dower in consequence of the deed of her husband and herself to Henry L. Fox of the date of June 15, 1858, which was declared void as against the tenant. The dower of a surviving wife is not barred by a fraudulent deed in which she released dower, if the deed is set aside by the judgment of the court at the instance of creditors of the husband. *Dugan v. Hussey*, 5 Bush (Ky.), 83; *Lockett v. James*, 8 id. 28. Where a wife joins with her husband in a deed conveying land, and thereby relinquishes dower, and a creditor of the husband after-

 Washington Ice Company v. Webster.

ward levies an execution upon the land, during the life of the husband, and recovers it in a real action against the grantee, on the ground that the conveyance was fraudulent and void as against creditors, the wife is restored to her rights, and may recover dower of such creditor, or of his assigns. *Robinson v. Bates*, 3 Metc. 40.

The defendant acquired the fee by his levy. The decree in the case of *Wyman v. Fox*, 59 Me. 100, specially excepted the dower of the defendant.

Judgment for the demandant, that she recover her dower.

CUTTING, BARROWS, DICKERSON, DANFORTH, and VIRGIN, JJ., concurred.

NOTE.—See also *Malloney v. Horan* (49 N. Y. 111), 19 Am. Rep. 335; *Morton v. Noble* (37 Ill. 176), 11 Am. Rep. 7; *Ridgway v. Mastig*, 13 Am. Rep. 351.—*Edw.*

 WASHINGTON ICE COMPANY V. WEBSTER.

(52 Me. 341.)

Statute of frauds—memorandum in writing—delivery and acceptance—Measure of damages in replevin suit.

Plaintiffs made defendant a verbal offer for a quantity of ice; defendant afterward telegraphed that he would accept the offer; and plaintiffs wrote to him inclosing a memorandum of the contract of sale for his signature, but defendant did not receive the letter, owing to a misdirection, until several days had elapsed, and meanwhile he had sold the ice to other parties. Plaintiffs seized the ice on a writ of replevin. *Held*, that there was no memorandum signed by the party to be charged within the statute of frauds; and that the seizure, by the officer, of the ice and delivery to plaintiffs under the replevin process did not amount to a delivery and acceptance within that statute.

The Revised Statutes of Maine, ch. 96, § 11, provide that "if it appears that the defendant" in replevin "is entitled to a return of the goods, he shall have judgment and a writ of return, accordingly, with damages for the taking and costs." *Held*, that the measure of damages to the defendant was the value of the property at the time of the taking, with interest and any special damage resulting from the taking and detention; and that the defendant was entitled to have the damages assessed, up to the time of the trial at nisi prius by the jury.

Washington Ice Company v. Webster.

A defendant in replevin who makes good his title is entitled to damages for the interruption of his possession, the loss of the use of the goods, and for their deterioration; but damages arising from the loss of customers are too indefinite, remote and contingent to be allowable.

The measure of damages is the same in replevin as in trover.

REPLEVIN of four thousand tons of ice. The facts appear in the opinion.

A. P. Gould, for plaintiff. The statute of frauds only intends to secure written evidence of the contract. *Browne's Stat. of Frauds*, 3d ed., § 352 a; *Siewewright v. Archibald*, 17 Adol. & Ell. (N. S.) 107, 114; *Morton v. Dean*, 13 Metc. 385. Documents and letters may be grouped together for the purpose of showing that a written memorandum was made. *Williams v. Bacon*, 2 Gray, 387; *Browne's Stat. of Frauds*, § 346, and notes; *Gale v. Nixon*, 6 Cow. 445; *Ido v. Stanton*, 15 Vt. 685; *Jackson v. Lowe*, 1 Bing. 9; *Sanderson v. Jackson*, 2 Bos. & Pul. 238; *Salmon Falls Manf. Co. v. Goddard*, 14 How. 447; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Lerned v. Wannemacher*, 9 Allen, 412, 416.

The rule of damages is the same in replevin as in tort. 2 Pars. on Cont. 478. The general rule is the value of the property at the time of seizure, with interest. 2 Greenl. on Ev., § 276, and notes.

B. F. Butler, *C. P. Thompson* and *H. Ingalls*, for defendant. There was no sufficient memorandum to take the case out of the statute of frauds. *Jenness v. Mount Hope Co.*, 53 Me. 20; *Waterman v. Meigs*, 4 Cush. 497; *Morton v. Dean*, 13 Metc. 385.

The damages should be the highest price ice reached after it was taken, with interest, and compensation for special damages. *Tuck v. Moses*, 58 Me. 462; *Barnes v. Bartlett*, 15 Pick. 71; *Swift v. Barnes*, 16 id. 194; *Parker v. Simonds*, 8 Metc. 205; *Kafer v. Harlow*, 5 Allen, 348; *Stevens v. Tuite*, 104 Mass. 328.

APPLETON, C. J. The plaintiffs replevied some four thousand tons of ice in store at Boothbay, in this State, from the defendant, who is admitted once to have been the owner.

By R. S., ch. 111, § 4, no contract for the sale of any goods, ware or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods * * * or

Washington Ice Company v. Webster.

some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent.

The first question presented for consideration is, whether the plaintiffs have acquired any title to the ice in controversy by virtue of any note or memorandum of sale "signed by the party to be charged thereby, or by his agent," for, if not, this suit cannot be maintained, unless a receipt or acceptance of the whole or a part is shown.

The defendant, then owning some four thousand tons of ice, on the 15th day of July, 1870, called upon Moses G. Leonard, the president of the plaintiff company, at their office in the city of New York, and proposed to sell the company the same. Leonard, in behalf of the plaintiffs, offered the defendant \$4.50 per ton for the ice he described, to be delivered on board vessels to be provided by his company during the ensuing summer; the ice to be properly stowed with sufficient dunnage on board vessels, at defendant's expense; and to be weighed on delivery into vessels; the plaintiffs to pay for it on receipt of sight drafts, accompanied by bills of lading. The defendant wanted time in which to accept or reject this proposition, and a week was given. He then desired it to be put in writing, which was declined. The parties then separated.

June 17, 1870, the defendant sent the following telegram, which was received on the same day at New York by the president of the plaintiff company.

"GLOUCESTER, MASS., June 17, 1870.

"To M. G. Leonard, President of Washington Ice Company, New York City, No. 393 and 395 Canal St.

"You shall have my ice for your offer. Write me.

"NATH'L WEBSTER."

The dispatch refers only to a verbal offer. It does not describe the price or the quantity of the goods to be sold, nor contain any of the elements of a sale. It leaves the whole contract, whatever it was, to be established by parol evidence. It is clearly within the statute of frauds. *Waterman v. Meigs*, 4 Oush. 497; *Jenness v. Mount Hope Iron Company*, 53 Me. 20.

On the same day, June 17, 1870, Leonard answered the defendant's telegram substantially as follows:

"Your telegram accepting our offer is received. I will send a memorandum of the offer to-morrow."

 Washington Ice Company v. Webster.

On the next day he sent the following letter:

“GENERAL OFFICE OF WASHINGTON ICE COMPANY,
 “393 AND 395 CANAL STREET,
 “NEW YORK, *June* 18, 1870. }

“DEAR SIR—I inclose to-day the form of contract for ice purchased, etc. You will examine, and if found correct, you will sign, and inclose one copy by mail to us; filling the blank, which, as you will perceive, is descriptive and not essential to the main question.

“Very truly yours,

“M. G. LEONARD, President.

“NATHANIEL WEBSTER, Esq.”

The form of the contract forwarded in the preceding letter was as follows:

“MEMORANDUM OF SALE.

“Nathaniel Webster, of Gloucester, *Maine*, has sold to the Washington Ice Company, of the city of New York, all the good and merchantable shipping ice of the said Webster, consisting of about four thousand tons, more or less, being the same now housed, in good and proper order and condition, on the shore of , at , in the State of Maine, referred to in an interview heretofore had by the said Webster with the president of said company, to be delivered by said Webster and properly stowed, with sufficient dunnage, at his expense on board vessels to be provided by the said company at the dock nearest to where said ice is stored, during the present summer, at the following prices to be paid by said company by sight drafts, on receipt by them of bill of lading of each cargo, viz.: Four dollars and fifty cents for each and every ton thereof weighed on delivery into the vessel, which prices the said company agree to pay at the time and in the manner specified.

“Dated *June*, 1870.

“M. G. LEONARD, President.”

[Internal Revenue Stamp, 5 cents.]

This contract was never signed by the defendant.

The letter inclosing this contract was addressed to Nathaniel Webster, Esq., Gloucester, *Maine*, and went to New Gloucester, Maine, arriving there on the 19th or 20th of June. On the 22d day of June it was forwarded to the defendant at Gloucester, Massachusetts.

 Washington Ice Company v. Webster.

The plaintiffs next sent the following telegram:

"NEW YORK, *June 27, 1870.*

"To NATHANIEL WEBSTER, Gloucester, Mass.

"When may we expect a cargo? Have you received our contract?

"M. G. LEONARD."

To this, the defendant being absent, his clerk sent in reply the following dispatch:

"GLOUCESTER, MASS., *June 27, 1870.*

"To M. G. LEONARD, President of Washington Ice Company, 393 and 395 Canal street, New York.

"Have received contract. Mr. Webster is away. Expect him home to-morrow.

"CLERK."

On the 30th day of June, the defendant sent the following letter to the plaintiff:

"GLOUCESTER, MASS., *June 30, 1870.*

"M. G. LEONARD, Esq.

"DEAR SIR—Your letter and contract was received by me yesterday, June 28. Not hearing from you, I supposed you had purchased the ice you spoke of in our interview of the eastern man, and consequently, after waiting one week, I disposed of my ice to other parties. Your letter, instead of being directed to Gloucester, *Mass.*, was directed to Gloucester, *Maine*, which may account for my not receiving it before.

"Yours very respectfully,

"NATH'L WEBSTER, per C. H. C."

On the same day the plaintiffs sent the following letter to the defendant:

"GENERAL OFFICE OF WASHINGTON ICE COMPANY, }
 "393 AND 395 CANAL STREET, }
 "NEW YORK, *June 30, 1870.* }

"DEAR SIR—If it will not be inconvenient to you to forward your ice during the month of July, we should prefer it at that time, as our greatest sales occur in this month, and as most of our

Washington Ice Company v. Webster.

ice comes to us from a distance, we are not always sure of having a full supply on hand. I am aware that you named September as the time of delivery, and we do not demand it at an earlier day, unless it may be just as convenient to you to do. Please let me hear from you in reply.

Truly yours,

"M. G. LEONARD.

"To NATHANIEL WEBSTER, Gloucester, Mass."

The contract of sale, to be binding by the statute of frauds, must be in writing. Thus far, in the process of the negotiation between the parties, there has been no note or memorandum setting forth the terms of any contract which has been signed "by the party to be charged thereby." The telegram of June 17, referring only to a verbal offer, was not binding any more than a verbal acceptance of a written offer upon the party so verbally accepting. *Smith v. Gowdy*, 8 Allen, 566.

June 18, 1870, the plaintiffs sent the form of a contract which, "if found correct," they desired the defendant to sign. The contract, with its blanks to be filled, left it utterly uncertain to what ice it referred, or where the same was situated. This contract the defendant did not sign, for the reason alleged in his letter, that previous to receiving it, the ice had been sold. As this letter is introduced by the plaintiffs, assuming it true, there could not be a contract passing the title to them, even if it had been signed, for the ice had then been sold and they would have purchased with a knowledge of such sale. But howsoever that might be, the plaintiffs' letter requires the blanks to be filled, and the contract to be signed, having previously thereto declined to reduce their offer to writing. It was the first time the plaintiffs had done any thing by which their company might be bound. Until that time they legally were at liberty to take or refuse taking the defendant's ice. The defendant, too, was in similar condition as to selling. Not being previously bound, it was for the defendant to determine whether he would then become bound by signing the proposed memorandum of sale, or not, and he determined not so to sign. He cannot be bound by a written contract to which he never became a party.

The memorandum forwarded for signature provided for the delivery of the ice "during the present summer." By the letter of the president of the plaintiff company of June 30th, the ice was to have been delivered in September. The memorandum, therefore

was variant from the verbal conversation. The defendant, therefore, might rightfully decline signing a written contract, different from the verbal conversation between the parties. *Richards v. Porter*, 6 B. & C. 437; *Hazard v. Day*, 14 Allen, 487; *Lyman v. Robinson*, id. 242.

The case of *Carter et al. v. Bingham*, 32 Up. Can. R. 615, is in point. It was an action for non-delivery of fifteen bales of hops alleged to have been sold by defendant to plaintiffs, the evidence showing that in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at 20 cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, "will take 15 to 20 bales good new hops at 20 cents, cash." On the 21st, defendant replied by telegram, "Your offer accepted. Have booked your order for fifteen bales new hops, for delivery when picked." On the 16th of September, defendant telegraphed: "Hops picked, ready for delivery. Answer back." On the 21st of September, plaintiffs telegraphed: "Our man will be there ready to receive hops early next week;" and on the 26th of September, "Ship the 15 bales hops to us at Galt to-day, and draw at three days sight;" and on the 27th, "If hops not shipped, will send team and money for them to-morrow; answer quick." On the same day defendant answers: "Cannot have hops." A tender of the price was subsequently made and refused.

Held, 1. That there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August was not a simple acceptance of the plaintiffs' offer of the 17th, but qualified it both as to quality (by leaving out the word good) and as to time of delivery; and assuming defendant's telegram of the 16th of September to be a renewal of such acceptance, the plaintiffs' subsequent telegram did not show an assent to it. In delivering the opinion of the court, MORRISON, J., says: "The rule of law I take to be, that an acceptance of a proposition must be a simple and direct affirmation, in order to constitute a contract, and if the party, to whom the offer or proposition is made, accepts it, adding any condition, with any change of its terms or provisions, which is not altogether immaterial, it is no contract until the party making the offer consents to the modifications; that there can be no contract which the law will enforce until the parties have agreed upon the same thing in the same sense." The agreement must be entire

Washington Ice Company v. Webster.

— as to the thing sold, its price, the time of delivery, and the terms of payment. In the present case, no such agreement is shown. To the same effect are the cases of *Siewewright v. Archibald*, 17 Q. B. 103; *Gether v. Capper*, 14 id. 39; *Hamilton v. Terry*, 11 C. B. 954.

There are one or two more telegrams introduced, but it is not perceived that they affect in any way the rights of the parties. The result is that the plaintiffs have failed to make out a sale "by any note or memorandum, signed by the party to be charged thereby."

It is urged that the plaintiffs have accepted and received the ice. To constitute an acceptance there must, first, be a delivery by the seller with intent to give possession of the goods to the purchaser. Here, no act on the part of the defendant is shown, indicating such intention in the slightest degree. The letters and telegrams of the plaintiffs show a claim to the ice, and a desire for its delivery, but to such claim or desire the defendants never acceded. The taking possession of the ice without, or against, his consent, is not a receipt or acceptance binding him. The forcible seizure of property sold, when the sale is void by the statute of frauds, cannot be deemed an acceptance or receipt within its provisions. If it were so, it would be to affirm judicially the rule that might makes right. Nor does the seizure of the ice by this writ of replevin, and a delivery of the same by an officer to the plaintiffs, constitute a statutory receipt, and an acceptance by the purchaser.

The defendant not having signed the memorandum of sale, transmitted for his signature, is not bound thereby. A seizure of the ice by force, or under color of legal process, without payment therefor, is not a receipt or acceptance thereof, within the statute of frauds. The plaintiff failing to show a legal title, the nonsuit must stand and a return be ordered. *Hoeffner v. Stratton*, 57 Me. 360.

After a careful examination of the cases cited in the elaborate argument of the counsel for the plaintiffs, we think they fail to sustain the plaintiffs' right to maintain this suit, or to show a title in him to the property replevied.

By R. S., ch. 96, § 11, "if it appears that the defendant is entitled to a return of the goods he shall have judgment and a writ of return accordingly, with damages for the taking and costs.

When the defendant makes a good title to the goods replevied,

he is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time of their replevin till their restoration, and for their deterioration. *Whitwell v. Wells*, 24 Pick. 34. Actual damages must be proved to entitle the defendant to recover more than nominal damages. "The cases in which six per cent upon the value of the goods replevied has been allowed as damages, in analogy to the rule in other cases of unlawful detention of property," observes HOAR, J., in *Bartlett v. Bricket*, 14 Allen, 62, "will be found to be cases where the defendant was entitled to a return, and where the chattels replevied were merchandise or other property capable of physical use or enjoyment." The damages, exclusive of the return of the goods or their equivalent in money, as secured by the bond, consists of interest upon the money value of the goods replevied up to the time of the verdict, and any special damages shown to result directly from their taking, in addition to such interest. *Stevens v. Tufts*, 104 Mass. 328. The damages for detention may exceed the interest upon the value of the property replevied; as in case of the replevin of a horse, or oxen, the defendant would be entitled to the value of their use, or for what their services in use would be worth. As in *Dorsey v. Gassaway*, 2 Harr. & Johns. 402, where negroes were replevied without right, the defendant was held entitled to a sum equivalent to the value of their labor. The damages are to be assessed to the time of the verdict for the defendant, upon the principles adopted in trover, save that the value of the property is not to be included therein.

The measure of damages in trover is the value of the property at the time the right of action accrues, with interest thereon. *Robinson v. Barrows*, 48 Me. 188; *Pierce v. Benjamin*, 14 Pick. 356; *Kennedy v. Whitwell*, 4 Pick. 466. Such is the general rule as recognized in this State and in Massachusetts.

The expenses of procuring teams and appurtenances actually incurred for the purpose of removing ice, which were rendered useless by the wrongful suing out of the writ of replevin, may enter into and become a portion of the damages.

The damages arising from the possible loss of customers are too indefinite, remote and contingent to become an element of damages. *Brannen v. Johnson*, 19 Me. 361.

If the defendant was liable on outstanding contracts which he

was obliged to fulfill, it would be easy for him to replace the ice taken, by ice to be purchased, for which he would be obliged to pay only the fair value, which will be precisely what he will receive.

The damages being assessed to the time of the verdict, if the goods replevied are not forthcoming on demand on the writ of return, the defendant in a suit by him on the replevin bond will be entitled to recover as damages, the value of the goods replevied at the date of the demand on the writ of return with interest thereon, the damages and costs assessed in the replevin suit, and interest. *Swift v. Barnes*, 16 Pick. 194.

The assessment at the trial becomes important principally when the goods are *in esse* and may be returned on demand upon the writ of return; as, if they are not then assessed and the goods are returned and costs paid, the defendant has no further remedy on his bond. *Pettygrove v. Hoyt*, 11 Me. 66.

In this State it has been repeatedly held, when there is no return, that the damages for the unlawful taking, which may not have been assessed in the replevin suit, may be recovered in a suit upon the bond. In *Dillingham v. Smith*, 32 Me. 182, where upon report a nonsuit had been entered without an assessment of damages, SHEPLEY, C. J., remarked that he considered damages recoverable in a suit upon the replevin bond. Subsequently the question came before the court in that case, in 33 Me. 385, damages were allowed in a suit upon the bond from the time of taking at the rate of six per cent; no other or higher damages being claimed. In *Thomas v. Spofford*, 46 Me. 408, the ruling of the court in *Smith v. Dillingham* was affirmed, and again re-affirmed in *Tuck v. Moses*, 58 Me. 461. It seems, therefore, fully settled that in a replevin suit, when damages are not assessed at *nisi prius*, or where a nonsuit is entered, that the defendant, when the property replevied is not returned, may recover all damages sustained, in a suit upon the replevin bond.

The plaintiff in replevin is bound by his own valuation of the property replevied; not so the defendant, who may show the valuation too low, and in a suit upon the bond recover the actual value of the books or other property taken wrongfully from his possession. *Thomas v. Spofford*, 46 Me. 408.

So, he is bound by his replevin bond to restore the goods in like good order and condition as when taken. He is responsible, if

judgment is against him, for the damages or deteriorated condition of the goods when restored. *Berry v. Hoeffner*, 56 Me. 171.

When goods not held under legal process are replevied, and after entry of the action the plaintiff becomes nonsuit and a return is ordered, but the goods replevied are not forthcoming on demand, the defendant in a suit on the bond is entitled to recover, as damages, the value of the goods when taken, and interest thereon from the service of the writ to the time of the rendition of judgment. *Wood v. Braynard*, 9 Pick. 322; *Thomas v. Spofford*, 46 Me. 408. So, where upon the evidence a nonsuit has been ordered, without any assessment of damages, and the goods replevied are not restored upon demand, or on the writ of return, the defendant may recover the damages sustained, which are to be assessed upon the same principle as they would have been if a verdict had been rendered when the nonsuit was ordered. *Dillingham v. Smith*, 30 Me. 370; *Smith v. Dillingham*, 33 id. 384.

The defendant is entitled to a full indemnity for the taking and conversion of his property without right. When, at the time of the demand on the writ of return, the goods replevied are not returned, if they shall then be of an increased market value, the defendant is equitably entitled to such increase. The damages in such case may be assessed up to the time when judgment was rendered on nonsuit, as they would have then been by the verdict of a jury, if a nonsuit had not been ordered. Then the value of the goods replevied, or of goods of like description at the date of the demand on the writ of return with interest, with the damages at the time of nonsuit, and cost and interest, will constitute the amount the defendant will be entitled to recover on his bond. *Tuck v. Moses*, 58 id. 461.

If the market value of the goods replevied shall be less at the time of the demand on the writ of return than when the goods are taken, the loss must fall on the plaintiff by whose wrongful act the defendant is deprived of his property. Besides, the plaintiff, having possession, might have sold them, which the defendant could not do. *Gordon v. Jenney*, 16 Mass. 465.

The parties had a right to have damages assessed up to the time of trial at *nisi prius* by the jury. The defendant claimed that they should then be assessed. The plaintiff did not. The presiding justice denied to the defendant the right to have his damages assessed. In this he erred.

By the terms of the report, if the action is not maintainable, the nonsuit is to stand.

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

ROBINSON V. ADAMS.

(23 Mo. 389.)

Will — insane delusion and undue influence — Spiritualism. Evidence.

A belief in so-called spiritualistic communications or revelations is not, in itself, an insane delusion. These communications come under the general rule as to undue influence; if they influence the mind of a testator, but do not control it in making his will or any part of it, the will is not void on the ground of undue influence.

It is not necessary to lay a foundation for the admission of the testimony of witnesses to a will, as to their opinion of the testator's sanity, by proving all the facts from which the opinion is formed.

Declarations of a testator are admissible to show the condition of his mind; and great latitude is to be allowed in the admission of such evidence.

APPPEAL from the decree of the probate court of Sagadahoc county, admitting to probate the will of Mary W. Green. The contestant was Mary A. Robinson, daughter of the testatrix and wife of George O. Robinson. The opinion states the case.

A. P. Gould, for appellant.

A. Libby, W. Gilbert and Francis Adams, for appellees.

KENT, J. This is an appeal from the decree of the probate court, allowing and probating the instruments purporting to be the last will and testament and codicil of Mary W. Green, widow of Gardner Green, late of Topsham, in this county, deceased.

The sole heir at law, the appellant, contests the probate of the will and codicil. The will and codicil, instead of giving the estate

directly to her, absolutely and in fee, devises all the property and estate, after payment of debts and expenses, to trustees, in trust for the uses specified. The substance of the provisions as to the trusts designated is, that the daughter, the appellant, shall have five hundred dollars *per annum*, out of the income of the estate, during the life of her husband, the residue of the income to be invested by the trustees. If the daughter shall survive her husband, then, after his decease, she is to have the whole of the income of the estate during her life-time, to her own exclusive use and benefit. After her decease the whole income is to be paid to her surviving child or children, and to the survivor of them during life, or during minority what the trustees may deem necessary for their thorough and suitable education; and, if necessary, they are to appropriate a part of the property, beside the income, for their support and education, provided the father is not of sufficient pecuniary ability to support and maintain them himself. The will then proceeds to make provisions by which the trust is to be continued, for the benefit of grand-children of the daughter, if any, and it is not to be terminated until the arrival of the youngest grand-child at the age of twenty-one years, when the whole estate, real and personal, is to go to the grand-child or grand-children, absolutely free of the trust, to them and their heirs forever.

In case the testatrix's daughter dies, leaving no lineal descendants surviving her, the property is to be divided among the children of the brother and sister of the testatrix, to whom it is also to go in case of the death of all the *cestuis que trust* before the youngest attains the age of twenty-one years.

In the trial of this case, certain questions were put in issue, under the direction of the court, arising under the pleas filed and joined. There were three separate pleas; in substance, these: — I. Denial of the due execution of the will; II. That the testatrix was not of sound mind at the time of the supposed execution of the will; III. That she was unduly influenced in the making of the will by various persons "and that the instruments (will and codicil) were not the fruit of her own mind and will, uncontrolled by other persons and influences." There was no brief statement specifying or limiting the points presented by the pleas.

The executors introduced evidence to prove the legal execution of the will, and the soundness of the mind of the testatrix. The only questions raised under this part of the case had relation to the

admission of certain evidence, and the instructions given as to the burden of proof and as to preponderance of evidence. These will be considered hereafter.

The appellant then offered a large amount of testimony under the second and third pleas, and to rebut the evidence as to soundness of mind, and to establish the fact of undue influence. This testimony took a wide range, and had relation to the history of the domestic relations between the daughter (the appellant) and the mother (the testatrix) and the husband of the daughter, including acts, visits, declarations, letters, evincing more or less of affection for her daughter and of aversion and dislike to her son-in-law, and persistent determination in such dislike, and in a purpose to prevent the daughter's husband from receiving any thing from her estate. The same kind of testimony was introduced to show undue influence on the part of living persons and from what she believed to be the spirit of her deceased husband, communicating with her through mediums. Under these pleas also there was a large amount of evidence, oral and written, to show that the testatrix was a firm believer in what are termed spiritual communications, between the living and the dead, generally believed by the class of people known as modern spiritualists.

The appellees (the executors) then introduced counter evidence on the same general topics, and such as they deemed pertinent to sustain their proposition of testamentary capacity and to refute the allegations of undue influence.

On this body of evidence it became the duty of the presiding judge to give instructions to the jury, and to some of these instructions, and to some denials of instructions requested, the appellant excepts.

We will first consider the exceptions to the charge.

The judge first considered the questions of soundness of mind, and subsequently as a distinct matter, the question of undue influence, placing them before the jury separately.

I. **SANITY.** The presiding judge stated to the jury that the statute makes soundness of mind a requisite qualification in a testator; hence, that it was incumbent on those who set up the will to establish this fact, and that burden does not shift; that the rule of preponderance of testimony in civil cases applies — not the rule of the criminal law. He said that "a person of sound mind" were the words of the statute; that a sound mind was a sane mind; that

sanity meant health, and that, therefore, a sane mind was a healthy mind. When a mind, not imbecile, acts healthy it may be called sound. But if a testator acts under a delusion which is the result of a disordered mind, amounting to insanity, and this delusion influences the testator in making his will, or any part of it, it will be sufficient to avoid it, on the ground of want of a sound mind when he made it.

The judge, after stating the fact that there were different degrees of insanity, and alluding to the cases of general insanity, in which all or most of the faculties and affections are deranged, so that this class are commonly said to be lunatics, entirely crazy, sometimes raving maniacs and sometimes quieter, yet with most of their powers of mind deranged, and the whole mind in a state of chaos and confusion, said he did not deem it necessary to discuss that kind of insanity, as it was not contended that this testatrix was in that condition of entire lunacy or madness. He would only say that if she was in that condition, then she was incapable of making a will, whether it could be established or not that any of such insane delusions operated upon her to make the will, or any part of it. But he did not understand that it was contended in this case that the testatrix was in that condition of entire lunacy when she made the will and codicil, but it is contended that her mind had become deranged from a healthy state, and that she entertained insane delusions, within the rule before given. He then told the jury that it was for them to decide whether she did or did not; and that if Mrs. Green, at the time of executing her will and codicil, or either of them, was laboring under a delusion or delusions amounting to insanity or monomania, which is insanity on a particular subject, or under insanity generally; and any of these insane delusions operated upon or influenced her in making the will as it was made, then she was not of the sound mind required by law.

The substance of this seems to be that the appellant contended that the evidence was sufficient to prove delusions, existing in her mind, such as would invalidate the will. The court ruled that the delusions must be such as amounted to insane delusions.

The propositions of the counsel, presented as requests for instructions, indicate clearly the specific points and grounds in relation to which it was claimed that these delusions existed and to which the rulings were applied. The first requested instruction was this, that if Mrs. Green believed that the spirit of her deceased

Robinson v. Adams.

husband directed or dictated the will and codicil and acted under that belief, they are void.

The second was, that if she entertained a groundless and causeless suspicion of Mr. Robinson's character, and that she was exposed to the control of evil spirits, and made the will and codicil under that influence, they are void.

The third was, that if she disliked Mr. Robinson, and believed that he had a supernatural power over his wife — a power through the aid of evil spirits — and was influenced to make her will and codicil as she did by this belief, then they are void.

The fourth was, that the will and codicil must be wholly the offspring of her own mind uninfluenced by any delusion.

As to the first requested instruction, the judge said, as appears by the report: "I give you that. I have already given it to you in substance." The judge evidently understood the request as bearing on the other point, of undue influence, concerning which the fifth request was presented. The judge had charged fully that if she believed that the spirit of her deceased husband directed or dictated the will, it would be void on the ground of undue influence, as will more fully appear when we come to consider that point of undue influence. The counsel, in his argument on this hearing, regards this as in substance a request to instruct that if such belief had any influence, although short of direction and dictation, it would invalidate the will. Or perhaps, in short, that a belief in spiritual communication was in itself an insane delusion, if it had any influence on the mind of the testatrix in making her will. If the judge had so understood the request, he would, doubtless, in consonance with his whole charge, have given this as he gave the second, third, and fourth requests (above cited) with the qualification in each, that if such matters amounted to insane delusion, as explained in the charge, and influenced her in making her will, the will would be void. The requests were, in effect, that the judge should rule as matter of law, that these specified matters, under each head, did establish such delusion as would render the will void. The judge did not thus take the question from the jury, but told them that it was for them to determine whether there was such a state of mind as came within the rules and definitions given to them. This was stated, as before recited, in the first part of his charge; and after calling the attention of the jury to the points made, and the facts proved, and the evidence bearing on each and

all of them, he concluded his charge on his part of the case by saying: "The point is this: did these things, these beliefs, these matters, with other influences, no matter what, create in her mind insane delusions? Did she act on them in the making of her will, or any item of it? If so, then you will be justified in saying she was not of sound mind." We think it clear that the final determination as to the testamentary soundness was with the jury after the definitions and rulings of the court as to the legal questions had been given to them.

Was there any substantial or material error in these rulings and definitions?

The charge was long and is reported by the stenographer in full, and doubtless correctly. But it necessarily presents many remarks and illustrations and repetitions which render it somewhat difficult to reduce the whole to a few simple propositions. Indeed, it is very difficult to comprehend the exact import of the charge in all its bearings without a perusal of the whole as given; but to afford this would extend this opinion unreasonably; a brief statement of the points must, therefore, suffice.

After stating that if a testator acts under a delusion, the will which is the result of a disordered mind is invalid (as before set forth), the judge called the attention of the jury to the point that the delusion must be the act of a disordered mind, and that the term "delusion," as applicable to insanity, is not a mere mistake of a fact, or the being misled by false testimony or statements to believe that a fact exists where it does not exist. This is sometimes termed delusion in common conversation. So some men will believe on much less evidence than others that a fact exists, particularly in matters not tangible to the senses, but resting in mental or spiritual theories or beliefs. A false assumption does not invalidate, unless it is an insane delusion.

The principal objection now made to the charge, under the general objection to it as a whole, relates to the definition given of an insane delusion. The judge read from Bouvier's Law Dictionary this definition: "A delusion is a diseased state of the mind in which persons believe things to exist, which exist only, or to the degree they are conceived of only, in their own imaginations, with the persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary."

The judge then added: "But insane delusion as a fact may be

where the supposed fact is the coinage of the brain, without evidence, a figment of the imagination." To this addition the counsel excepts, assuming that this was a definition extending and including all cases of insane delusion. But it was simply a definition applicable to one class of delusions and not intended to exclude all other cases; and even this was not stated absolutely, and was confined to delusion as of a fact. The judge then explained to the jury the difference between a delusion as to the existence of a fact and one where the fact is rightly apprehended, but the reasoning upon the fact and the conclusions drawn from the existing fact are entirely wild and absurd, showing that the insanity is in the mental powers and operations.

Coming to the case before them, the judge asked "if a delusion existed in any form, was it an insane delusion?" He then gave to the jury a definition furnished by the counsel for the appellant, as follows: "In a legal point of view, insanity is where a person believes something to exist, which not only does not exist, but of which he has no evidence sufficient to satisfy any healthy mind, and he acts upon it, reasons upon it, and holds it as a reality." This was given as an instruction, the judge adding this: "That may be an insane delusion; that is to say, where it is so palpable that he believes it without reason; any reason sufficient to satisfy any healthy mind; and he acts upon it, when it cannot possibly be true; that is an insane delusion."

Now this additional explanation is strongly objected to by counsel as extending the rule given in the book, to the injury of his client. But the rule starts with the absolute assertion, or assumption, as the basis of the whole rule of law, of the fact that the "something which the person believes to exist" does not exist. It requires, to start with, the absolute non-existence of the fact believed to exist, and this, of course, must be established conclusively, before any conclusion of insanity can be drawn. It would seem to be too plain to need any argument, that, before an insane delusion as to a fact could be predicted or established, the non-existence of the fact must be, in some mode, put beyond doubt. The judge, in another part of his charge, said: "Before anything (in law) is a delusion, the non-existence of it must first be established."

The qualification, as given, was rather to relax the rule in favor of the positions of the appellant than to make it more stringent.

It evidently had particular reference to the belief in spiritual and supernatural influences and communications. By the literal meaning of the rule given in the book, it must first be established absolutely, as a demonstrated fact, that the matter, or fact, about which the delusion was said to exist, had no existence. But, clearly, it would be impossible to prove that, in the present instance, by direct testimony. The judge, therefore, qualified the rule, by allowing the jury to find that it might be an insane delusion, if the testatrix believed what could not possibly be true, although no positive or direct evidence was or could be offered, to establish the falsehood of such spiritual beliefs. The jury might determine this point in favor of the proposition of insanity, on their own conviction of the impossibility of the truth of the facts on which the claimed delusion rested. We do not see how the appellant was injured by this qualification of his requested instruction by the presiding judge.

The jury were then directed to apply this test to all the facts in the case, as shown in the evidence. The principal difference between the requested instructions and those given is in this: the requests asked for rulings that should declare, as matter of law, that certain facts and matters recited were, each in themselves, insane delusions, and rendered the will, for that cause, void; the rulings given did not so declare, but required the jury to determine, after a full and fair consideration of all the evidence bearing on the question, whether the testatrix was under an insane delusion, within the rule given.

The court will not ordinarily withdraw the question raised under the issues framed from the jury, where the very purpose of framing such issues is to have the jury inform the court as to the truth of certain allegations, as is the case where the Supreme Court of Probate is called upon to probate a will, and the due execution of it, or the soundness of mind of the testator, is in question. It is the duty of the court to give instructions on the points of law, and to explain and illustrate them, but it will not, unless possibly in some cases where there can be no real question of fact to be determined, undertake to direct the jury what their finding shall be. Even then it would be the more proper course to withdraw the issues from the jury, and for the court to act on its own convictions, without the aid of a jury. There is no common-law right to demand a trial by jury in cases of appeal from the probate

court. It is only when, upon a hearing of such appeal, "any question of fact occurs proper for trial by jury, an issue may be formed for that purpose, under the direction of the court, and so tried." It is true that, if the requested instructions had been given, some questions of fact would have remained for the jury; but, substantially, the court would have declared that she was not of sound mind.

The grounds chiefly relied upon to show unsoundness of mind were the belief in spiritual communications, particularly with the spirit of her deceased husband, and her suspicions and beliefs as to her son-in-law, Mr. Robinson, touching his exposure to the control of evil spirits, and his possession of supernatural power over his wife, through the aid of evil spirits.

The judge did not rule that the belief in what are called spiritual communications or revelations, that is, that spirits do communicate with human beings through mediums, was *ipso facto*, and in itself, an insane delusion. Nor did he say peremptorily that it was not; but he told the jury to consider how far that belief showed delusion, under the rule before given them, and whether that belief was in itself an insane delusion.

The learned counsel for the appellant has denounced such belief in very powerful and eloquent language, and calls upon the court to deny to it "a standing court," and to show its concurrence in the denunciation of an English judge, who termed it "mischievous nonsense," with other like designations.

And yet the good sense of the counsel realized that we were called to deal with this matter not theologically — or in one sense, morally or scientifically — but legally, as bearing on the single point of insanity, or insane delusion. What our individual or collective opinion as to the facts, truth, possibilities, or evidence, or claims, of this so-called spiritualism, may be, has nothing to do with the questions before us. It is only as to the proved effect of this belief on another person's mind, that is before us. Did this belief unsettle her intellect, and make her of unsound mind, within the meaning of the statute? Even if true, it might produce that effect, by a long continued, and exclusive and fanatical devotion to the thought. The judge so said in substance when he stated to the jury, by way of illustration: "Now there are questions constantly arising in relation to mere speculative belief in abstract propositions of theology or law, or other matters, particularly in

theology, spiritual truths. These mere speculative beliefs of abstract propositions you may think very absurd; you do not see how anybody could believe such things, such creeds or doctrines, yet others may believe them, and not be insane. They may rest so in a persons mind, and work so in his intellect, may upset his mental powers generally, or partially, or topically, on particular points, so that he may become insane, arising from this very cause."

He illustrated further, by the case of a man who believed fully in the second coming of Christ, personally and bodily. This to many may seem a strange and unsustained faith. But would any one say it was an insane delusion? But by constantly dwelling on this single idea, he comes to believe and to proclaim his belief, not merely that Christ will come again on earth, but that he himself is the very Christ that was to come, and to assert his official character with perfect assurance and sincerity. There the delusion would be, not in the original faith, but in the consequences that have worked out from it in his mind, finally upsetting his powers of reasoning, until we say that man has an insane delusion.

The judge also stated further that in this case it was contended that the testatrix believed more than this simple proposition of the existence of spiritual communications; that she believed that she had the power to heal, and to some extent exercised it at home and on others; that she believed it was the same sort of power that was employed by Christ and the apostles; and, further, that she had various other imaginations and delusions, in one form or another. The judge then gave the rule before stated, telling the jury that all these matters were before them, and it was for them to say, in view of them all, whether, singly or together, they had brought her to the state of unsoundness of mind, by reason of insane delusion or illusions; and whether such delusions operated upon her in making this will.

Preliminary to this summing up and as included within it, attention had been called also to all the evidence touching the relations between the testatrix and her daughter and Mr. Robinson, and her beliefs and acts, and feelings and declarations, with the distinct instruction that "if the conditions in the will were made through dislike of Mr. Robinson, if that state of mind was a delusion and had reached the point of being an insane delusion, and it was for them to determine whether it did or not, then it would invalidate the will."

We do not perceive what valid objection can be made to the charge on this point of soundness, when it is examined in its full scope and fair meaning. Indeed, the counsel frankly admits in his very elaborate argument on all the points: "we do not contend that a mere speculative belief in spiritualism, if it is not acted upon, and has no influence over the testator, would render a person incompetent to make a will."

This belief, then, *per se*, is confessedly not insanity or an insane delusion. But the counsel does contend that "if the will was made under such an influence, or if such an influence had any effect upon the mind of the testator in making the will, it is invalid."

But if the belief was not in itself an insane delusion, how could acting upon it sustain the plea of unsoundness of mind? Or why should the judge rule, as matter of law, that acting upon a belief, confessedly not in itself incapacitating, invalidates the will?

But it was contended that the proposition was correct as applied to the issue, charging undue influence. This leads us to the consideration of the rulings on this separate and distinct point. The instructions on this head started with the assumption that the jury failed to find such insane delusion as would invalidate the will. The court said: "It is contended that if there was sanity, and no general or specific delusion to a degree sufficient to invalidate the will, yet that such a dominion or influence was obtained by others over the testatrix as to prevent the exercise of her own judgment, will and wishes, and that the will was in fact not the expression of her own will and wishes and intentions, but was substantially the act of others, and not of herself." The judge, in substance, said that such influence, however exerted, would be undue, and would render the will made under it void; that it must be such and so exercised, as in effect to destroy the freedom of the testatrix's will, so as to render her act more the offspring of the will of others than her own, at least in some of the provisions of the will.

He said, "that a testator might receive the advice, opinions and arguments of others, and if after all such advice, requests or persuasions, however persistently, or however strongly urged, the testator is not controlled by them to the extent of surrendering his free agency, and yielding his own judgments or will and so, not making his own will, but adopting for his own will the will or wishes of others, then there is no such undue influence as is required to be proved to avoid the will."

There seems to be no exception to these rulings so far as they apply to living persons. The rule as given is according to the most approved authorities. But there remained the point, as to undue influence, connected with the alleged spiritual communications. On this, the judge said: "The question arises, if she was of sound mind generally, and if no living person did unduly influence her, yet she may have been under the control and dictation of what she believed was the spirit of her deceased husband, communicating to her directly through a medium: and that to her it was a reality; and that her own will was subordinated to her husband's will, and that will was his and not hers. It is contended that this was a delusion, and an undue and improper influence. On this point I give you the same rule as before stated. If she did thus believe, and if she did have what she deemed direct communications on the subject of this will, and implicitly followed them, yielding her own will and judgment and exercising no free agency (as before explained) then it would not be her will, but another's, in the same manner as if actually dictated by a living person. But if she did thus believe, and had what she deemed her husband's opinions, wishes or judgments, if she nevertheless acted her own will and her own judgment, as before explained, and did not abandon both to the supposed wishes and opinions of her husband, then it would not be undue influence, although she might have had full faith in the supposed communications and have regarded them as her husband's advice. I give you the same rule, in short, as I gave as to living persons."

We have made these full extracts, in order to present distinctly the exact point decided.

It will be observed that the ruling on this point was entirely disconnected from that relating to insanity or insane delusion. It proceeds on the ground that the testatrix was of sound mind, and that this matter of a belief in spiritual manifestations was not found by the jury to be an insane delusion.

The appellant contends that if any such communication had any influence, however slight, or however short of dictation, on the mind of the testatrix, it would invalidate the will, although in all respects she was of sound mind.

There is no doubt that the law allows any person to seek advice, suggestions and opinions from others, where no fraud or deception is practiced. The law does not limit the range. If a pious man

of sound mind should seek advice by prayer, and should believe that he had a direct answer, and should regard it, not as dictation, but advice entitled to consideration, would any one say that his will could be set aside as made under undue influence? Or if such a man should say, "I have had a dream which impresses me considerably as to the disposition of my property, and I shall give it consideration," would any one say his will was void, unless it was shown that the testator yielded his own will and judgment to the suggestions of his dream? In this case, the widow, it is assumed, thought she had received letters, not from an absent husband, but from one who had gone beyond this world to another, and, in them, some suggestions as to the disposition of her property; that she did not yield implicitly and blindly to these suggestions, but regarded them — as she would have regarded such letters if they had been written during life — as friendly suggestions, which had some effect on her mind, but not to the point of destroying her own free will and deliberate judgment. Now, it is evident that the judge must either direct the jury to disregard entirely all this matter about spiritual communications, as having no bearing on the question of undue influence, or rule that if they had the slightest influence on the mind of the testatrix in making her will, they entirely invalidated it; or else rule, as he did, that they must be taken into consideration by the jury and come under the general rule as to undue influence, and be subjected to the same test. If they dictated the will, it was void. If they influenced the mind, but did not control it in making the will or any part of it, then the will would not be by them invalidated on the ground of undue influence.

Without pursuing this point at more length, we say that we do not find these instructions erroneous.

There were several objections made and exceptions taken in relation generally to the admission or rejection of evidence. The first is, that the subscribing witnesses to the will were allowed to testify to their belief and opinion as to the soundness of her mind at the time of executing the will. It is not denied, however, that such witnesses may so testify.

But it is insisted that, to lay a foundation for such admission, all the facts transpiring at the time, all that was said and done, and all the premises from which the conclusion was drawn, must be stated. We do not so understand the rule or the practice. The

rule admitting the opinion of witnesses to a will is somewhat exceptional. It is thus stated in *Greenleaf on Evidence*: "Witnesses to a will are permitted to testify as to the opinions which they formed of testator's capacity, at the time of executing his will." It is the opinion then formed that is admissible. The precise point in the examination when the question is put is not material. It may be as soon as they have shown that they were present and witnessed the will at the request of the testator. It is the fact of being a witness to the will, that gives this right to ask his opinion of the soundness of mind of the testator. It may be given, although the witness was suddenly called in, and heard only the request to sign and the declaration of its being his last will. It is undoubtedly true that all the facts seen or known by the witness at the time are proper subjects of inquiry by either party, and it is proper that they should be. But it is not legally necessary that all should be detailed by the witness, if not asked by either party, before he can give his opinion. The weight and value of his opinion may depend very much upon his means of observation and knowledge; and if he can give few grounds for his belief or opinion, his testimony would, doubtless, have very little weight with the jury. But it is for the parties to bring out from the witness such facts as they deem important, touching the extent of knowledge on which the witness bases his opinion.

The exceptions to the answers of Narcissa Stone and Wm. G. Barrows are based on the assumption that they were expressions of opinions by non-experts. These answers were given in connection with details of certain facts introduced by the appellees, in refutation of the allegation of unsoundness of mind made by the appellant.

They were both mere negations; statements that they did not observe certain facts touching the mental condition of the testatrix; i. e., one said she did not observe any failure of mind, and the other, who was a witness to a former will, that he observed nothing peculiar. *State v. Pike*, 49 N. H. 408; S. C., 6 Am. Rep. 533.

The only objection in the argument is, that these were expressions of opinion on the question of testamentary capacity.

The question, whether opinions of witnesses not experts are, in all cases where insanity or delusions are in question, to be excluded, has recently been much discussed, particularly in a learned opinion by Mr. Justice DOE of the Supreme Court of New Hampshire.

If the case required it, we might, perhaps, review some of the former decisions of this court. But certainly nothing less than a distinct expression of the opinion of the witness, given as such opinion directly, comes within our rule. Mere negations, such as stated by these witnesses, do not give to the jury an affirmative opinion. They, at most, state negatively that nothing was observed by them. This is not an opinion of the witness, but had relation to a fact, as to the condition of the person.

The next exception is that a witness was not allowed to testify to the contents of a letter. A witness (the appellant) having testified that her mother (the testatrix), when visiting her at the west, had received letters, a good many from Maine, which made her uneasy and discontented, she was asked from whom they came. This was objected to; the appellant, by her counsel, then offered to show that they were received from A. J. Stone and Mrs. Dennett, but it was objected to, and the question ruled out. A similar ruling was made, when, after Mr. Robinson had testified that some communications were sent to Bloomington that were injurious to him and his family, on objection, the court ruled that the witness could not state the contents of the communications.

No evidence was offered of the loss of the letters, or of any attempt to obtain them by summons, or otherwise. The rejection of this evidence was clearly within the well-established rule, that the contents of a written document cannot be given by a witness, except in case of loss or inability to obtain it.

Another objection has relation to the admission of the declarations of the testatrix, written and verbal, to show the state of her mind. The report states "that the defendant (the appellant) seasonably made a general objection to all declarations, conversations, statements and acts of Mrs. Green, which did not relate to the subject of spiritualism, or the execution of the will or codicil sought to be set up. The testimony was not thus limited by the court, by a specific ruling to that effect as requested, but testimony was given, as appears in the report," not limited as requested.

Was it the duty of the judge thus to limit in advance, or at all?

The issue was a general one; soundness of mind. The executors had offered some testimony upon this point; the appellant then offered a great mass of evidence, tending to show a want of soundness. This evidence was not confined to spiritualism, or the execution of the will; it embraced evidence tending to show that Mrs.

Green not merely believed in spiritual communications, but that she entertained delusions of an extraordinary nature concerning her son-in-law and his wife; particularly concerning Mr. Robinson. As before stated, there was a great deal of evidence on this matter, covering many years and many declarations, acts, imaginations and asserted delusions. And there was further evidence, on a matter not properly a part of a belief in spiritualism, as generally understood. It is thus stated by the judge in the charge: "But it is contended that she believed more than that simple proposition; that she believed that she had power to heal, and, to some extent, exercised it at home and on others; that she believed it was the same sort of power that was employed by Christ and his apostles; I suppose of the same nature as the power possessed in those miraculous days; and that she had various other imaginations, delusions in one way and another." The appellant offered evidence on all these matters, which was admitted, including spiritual communications and declarations of various kinds; all admitted to show the state of the testatrix's mind, covering many years.

The executors resumed, and the judge permitted them to show like declarations, acts, beliefs, etc. There was no limitation suggested until after the appellant had put in this great mass of evidence. The issue was on the soundness of mind of the testatrix, and the court ruled that the burden to sustain this general proposition was on the executors, and that it did not shift, but remained on them to the end. Spiritualism and the due execution were not the only matters to be considered, or rebutted. The great fundamental rule of law, which requires impartiality between the parties, would have been violated by the ruling requested, and it was properly refused. How far a party can be allowed to interpose objections as to particular testimony under such a general objection, may be very questionable. But if open, we do not find, on perusal of the report, any admission which is clearly illegal. The rule allowing the introduction of the declarations of a testator, to show the condition of his mind, is very general, and admits much that would be excluded if offered as testimony to prove facts. The rule allows great liberality to both parties as to the kind of evidence, and as to the length of time over which it extends. Much is necessarily left to the discretion of the presiding judge, and it is impossible to lay down any general rules which would cover all cases. To enable the jury to determine the real state of mind, the action of that mind, as shown best by

Robinson v. Adams.

conversations, declarations, claims and acts, is the most satisfactory evidence. But, in order to fairly judge, the examination must not be confined to a single declaration, or conversation, but must embrace sometimes many years and many different acts and declarations, and sometimes, perhaps, the evidence may, at first view, be remote and far from a demonstration.

The judge was very decided and emphatic in his charge to the jury in enforcing upon them the fact, that these declarations of Mrs. Green were admitted to show her state of mind, and of her feelings toward the parties, and whether or not they exhibited evidence of insanity, or delusion amounting to insanity, at any time. "They are not to be regarded as proof that what she said to the witnesses, or wrote in these papers, were facts. They are not given on oath. They are not legal evidence of the facts stated. The judge repeated and elaborated this idea, so that the jury must have understood the weight they could give to this species of evidence.

The exceptions, however, as to this part of the case, are that the evidence was not confined to spiritualism and the execution of the will. We think it clear that it should not have been.

The chief, if not the only, specification dwelt upon by the counsel is the written statement of Mrs. Green, which has annexed to it a jurat. The counsel is mistaken in saying that it was used as evidence of the facts therein stated. It was admitted expressly—the same as much other evidence of a like character—solely to show the state of mind of the testatrix in reference to the very matters in question. The jurat did not make it a deposition, or give it any greater force or effect. It was still the declaration of Mrs. Green, and the jury were charged distinctly, not to regard it as proof of the actual existence of any fact.

The rule given as to the burden of proof was clearly correct.

Exceptions and motion overruled.

APPLETON, C. J., WALTON and DICKERSON, JJ., concurred.

BARROWS, J., did not sit in this case.

HUNTER V. RANDALL.

(88 Me. 482.)

Statute of frauds—oral misrepresentations of financial credit of another.

Plaintiff was induced to loan money to O. by means of false and fraudulent oral representations made by defendant concerning the financial credit and ability of O. The money was paid by plaintiff to defendant who passed it over to O. *Held*, that the statute of frauds was a defense to an action for money had and received.

It seems that defendant might have been liable in some form of action if the credit had been given to him instead of to O.; or if defendant and O. had conspired to defraud plaintiff; or if defendant's representations had related to specific property of O. instead of to his general character and credit.

ACTION for money had and received. The opinion states the case.

Tallman & Larabee and *W. Gilbert*, for defendant.

N. M. Whitmore and *J. S. Baker*, for plaintiff.

PETERS, J. In our view of the facts of this case, the instruction complained of was erroneous. There was evidence tending to show that the plaintiff made certain loans to one Ezekiel Oliver; that he was induced to do so by means of certain false and fraudulent oral representations, made by the defendant, concerning the financial credit and ability of Oliver; that the money was paid by the plaintiff into the hands of the defendant, as the bailee or agent of Oliver, and immediately passed by him to his principal.

The jury, among other things, were instructed, substantially, that it was immaterial whether the defendant paid the money over to Oliver or not; or that he informed the plaintiff, when he obtained the money, that he got it for Oliver; or that he, in fact, got it for Oliver, and upon his credit, provided it was passed to him through the defendant's hands.

We think that these facts would bring the case within the statute of frauds; and that, for that reason, the instruction cannot be sustained. Besure, in this case the statute was not specially pleaded by the defendant, nor was it required to be, where the declaration

contained only the general count of money had and received, as the nature of the claim alleged was not thereby disclosed to him. *Boston Duck Company v. Dewey*, 6 Gray, 446. Nor does it appear that the evidence alluded to was admitted against the objection of the defendant, but it was so interwoven with the other testimony, which was admissible, that any attempt at separation in the story of witnesses would have been impracticable. We are of the opinion that the defendant was guilty of no laches that should debar him of this defense.

The declaration does not, of itself, set out the particular facts which show the wrong complained of to be within the statute of frauds. Nor is that necessary in order to make a defense under the statute available. The language of the act is that "no" action shall be maintained "by reason of" any representation. It does not require that the plaintiff must, in terms, declare upon the representation. The true test whether the cause of action, in whatever form alleged, comes within the statute is, whether the action can be sustained without proof of the representation. If such proof is essential to the action, the statute applies. It is immaterial that the defendant may have had some design of obtaining an advantage to himself in consequence of the loan to Oliver, or that such a thing resulted from the transactions, provided the primary object of the representations was to induce the procurement of a credit to Oliver, and the loans were obtained thereby. In such case the protection extended by the statute is absolute and complete. These propositions are directly maintained by the following authorities: *Kimball v. Comstock*, 14 Gray, 508; *Wells v. Prince*, 15 id. 562; *Mann v. Blanchard*, 2 Allen, 386; *McKinney v. Whiting*, 8 id. 208; *Haslock v. Ferguson*, 7 Ad. & Ell. 94; Browne on Statute of Frauds, § 184; *Hearn v. Waterhouse*, 33 Me. 96.

This view of the case does not necessarily deprive the plaintiff of all remedy. The rulings and instructions now complained of would undoubtedly be right, should it appear in another trial that the credit for the loans was given to the defendant, instead of to Oliver. The statute was evidently intended to bar only actions for verbal representations, made with the intent that the person concerning whom they are made may obtain credit, money or goods thereupon. *Norton v. Huxley*, 13 Gray, 287. Or should the plaintiff be able to show that he parted with his money in consequence

Lawler v. Androscoggin Railroad Co.

of representations made by Oliver himself, of which the defendant had knowledge, concurring and conspiring with Oliver, in such case the defendant might be liable in tort, or for money had and received, the plaintiff waiving the tort. See *Knapp v. Hobbs*, 50 N. H. 476, a case in some of its features resembling the case at bar *Richardson v. Kimball*, 28 Me. 476. Or should it appear that the representations relied upon, if made by the defendant, related to the nature, character and title of the mill property of Oliver, rather than to his general character and credit, pecuniarily, then an interesting question would arise, upon which judicial opinion is somewhat divided, whether or not the action can be maintained on that account. All these hypotheses of fact have some semblance of foundation, at least, in the evidence reported. See *Browne on Statute of Frauds*, §§ 182, 183; *Medbury v. Watson*, 6 Metc. 246; *Swann v. Phillips*, 8 Ad. & Ell. 457; *Lyde v. Barnard*, Tyrw. & Gr. (Exch.) 250.

Exceptions sustained.

APPLETON, C. J., CUTTING and DICKERSON, JJ., concurred.

WALTON, J., concurred in the result.

LAWLER V. ANDROSCOGGIN RAILROAD COMPANY.

(28 Me. 492.)

Master and servant — injury to servant by negligence of co-servant.

A declaration alleged that plaintiff was employed as a laborer, in repairing a culvert for defendants, which was in a dangerous condition; that the danger was unknown to him, but known to defendants' agent and roadmaster in charge of the repairs; and that defendants, by their agent and roadmaster, so negligently conducted the repairs that plaintiff was injured. *Held*, that the declaration was insufficient, because there was no allegation of negligence on the part of the defendants in selecting competent servants, nor that the injury was caused by the dangerous condition of the culvert. Defendants' roadmaster and plaintiff must be deemed fellow servants. (See note, p. 496).

ACTION on the case for injuries received by plaintiff, while employed by defendants in repairing a culvert. The declaration alleged in substance that the plaintiff was employed as a laborer

Lawler v. Androscoggin Railroad Co.

by defendants, a railroad company, in repairing a culvert which was in a dangerous condition; that he was not aware of the danger, but defendants' agent and roadmaster well knew such danger; and that defendants, by their agent and roadmaster, so carelessly and negligently managed, conducted and supervised the making of the repairs, that an overhanging mass of stone and earth fell upon plaintiff, seriously injuring him. A demurrer to this declaration was sustained, and plaintiff excepted.

Bradbury & Bradbury and Record & Hutchinson, for plaintiff. It was unnecessary to allege negligence in defendants, except in a general way. Hilliard on Remedies for Torts, 227; *Indianapolis v. Keiley*, 23 Ind. 133; *Chicago v. Carter*, 20 Ill. 370. The roadmaster was acting for defendants. Shearman & Redfield on Neg. 113, § 87, and cases cited; *Goddard v. Grand Trunk R'y*, 57 Me. 223; S. C., 2 Am. Rep. 39. The roadmaster and the laborers were not fellow-servants. Shearman & Redfield on Neg. 127, § 102.

Frye, Cotton & White, for defendants. A servant can only recover of his master for an injury when it was caused by the direct act of the master, or by his negligence in hiring an incompetent person to carry on the work, through whose incompetency the accident occurs. Therefore such negligence must be stated in the declaration, or it will be bad on demurrer. Schouler on Dom. Rel. 642; Shearman & Redfield on Neg., § 90; Redfield on Railways, 518, § 131; 2 Hilliard on Torts, 470, § 25; *Carle v. B. & P. C. & R. R. Co.*, 43 Me. 270; *Buzzell v. Laconia Co.*, 48 id. 113; *Beaulieu v. Portland Co.*, 48 id. 295; *Hayes v. Western R. R. Co.*, 3 Cush. 270; *Albro v. Agawam Co.*, 6 id. 75; *King v. B. & W. R. R. Co.*, 9 id. 112; *Gilshannon v. Stony Brook R. R. Co.*, 10 id. 228; *Seaver v. B. & M. R. R.*, 14 Gray, 466, and many other cases. It makes no difference whether the servants are of the same grade or not. *Beaulieu v. Portland Co.*, *supra*.

APPLETON, C. J. It is well settled in this State that a servant who is injured by the negligence or misconduct of his fellow-servant cannot maintain an action against his master for such injury. *Carle v. B. & P. C. R. R. Co.*, 43 Me. 269; *Beaulieu v. Portland Co.*, 48 id. 291. "The rule," observes EARLE, C. J., in *Tunney v. Midland Railway Co.*, Law Rep., 1 C. B. 291, "has been settled by

a series of decisions, beginning with *Priestly v. Fowler*, 3 M. & W. 1, and ending with *Morgan v. Vale of Neath Railway*, Law Rep., 1 Q. B. 148, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the negligence of his fellow-servants." This is pretty universally recognized as law in the decisions of the courts of the different States in this country.

Nor is the law held differently when the employee causing the injury is engaged in a different department of the same general service, or exercising a higher grade of authority. In *Feltham v. England*, Law Rep., 2 Q. B. 33, it was argued that the foreman, by whose negligence the injury occurred, should be deemed as the "alter ego" of the master and not as the fellow-servant of the party injured, but the court held otherwise. "We think," remarks MELLOR, J., "that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow-servant of the plaintiff, although he was a servant having greater authority. As was said by WILLES, J., in *Gallagher v. Piper*, 33 L. J., Q. B. 335, 'a foreman is a servant as much as the other servants whose work he superintends.'" This was held to be the law of this State, in *Beaulieu v. Portland Co.*, 48 Me. 295; and in Massachusetts, in *Gilshannon v. Stony Brook R. R.*, 10 Oush. 228; in Vermont, in *Hurd, adm., v. V. C. R. R. Co.*, 32 Vt. 473.

The master is liable for the consequences of negligence in the selection of his servants. The gist of the action is negligence. It is the duty of the master to select fit and competent servants. Negligence exists when the master fails to do his best to accomplish this. *Gilman v. Eastern R. R.*, 10 Allen, 238; *Warner v. Erie R. R.*, 39 N. Y. 468. Where the servant attempts to hold the master for his negligence in procuring suitable servants, the charge of negligence should be duly alleged in an appropriate count. *Harper v. Ind. & St. Louis R. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. R.*, 49 id. 167.

The master of men in dangerous occupations is bound to provide for their safety, and this obligation extends equally to the providing good and sufficient machinery, and to the procuring skilled and judicious men by whom it is to be controlled. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Fitch v. Allen*, 98 id. 573

Lawler v. Androscoggin Railroad Co.

When a master employs a servant on a work of a dangerous character, he is bound to all reasonable precautions for the safety of his workmen. *Patterson v. Wallace*, 1 Macq. 757. And that they be not exposed to unreasonable risks. *Noyes v. Smith*, 28 Vt. 29. But the negligence of a fellow-servant is regarded as an ordinary risk. *Brydon v. Stewart*, 2 Macq. 30.

The declaration alleges that a culvert being out of repair and in a dangerous condition, and the plaintiff being employed to repair the same, he being ignorant of its dangerous condition, of which the defendants, or their servants, were well aware, the defendants "by their agent and roadmaster did so carelessly and negligently manage and conduct, supervise and control the making of said repairs upon said culvert," that the plaintiff was grievously injured. The careless and negligent management of the defendants' servants is the only cause of the injury set forth. There is no allegation of negligence on the part of the defendants in selecting incompetent servants, nor is it alleged that the dangerous condition of the culvert was the cause of the injury.

Exceptions overruled.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

NOTE.—On the question of common employment, or as to when servants are co-servants, see *Lalor v. Chicago, Burlington & Quincy R. R. Co.* (52 Ill. 401), 4 Am. Rep. 616; *Chicago, etc., R. R. Co. v. Murphy* (53 Ill. 336), 5 id. 48; *Fiske v. Boston & Albany R. R. Co.* (53 N. Y. 549), 13 Am. Rep. 545; *Brothers v. Carter* (52 Mo. 378), 14 Am. Rep. 424; *Ford v. Fitchburgh R. R. Co.* (110 Mass. 240), 14 Am. Rep. 598.

In *Laning v. The New York Central R. R. Co.* (49 N. Y. 521) 10 Am. Rep. 417, FOLGER, J., in delivering the opinion of the court, states the general principle :

"A master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general business. Nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness, or misconduct has caused the injury, if the service of each, in his particular labor, are directed to the same general end. And though the inferior in grade is subject to the control and directions of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary, to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes, the master is not liable." But CHURCH, C. J., in delivering the opinion of the court, in *Fiske v. The Boston & Albany R. R. Co.*,

Lawler v. Androscoggin Railroad Co.

supra, observed that there is a "difficulty in applying the rule in actions against corporations, whose whole business can only be transacted by agents who are in some sense co-servants. In 39 N. Y. the court decided that a corporation was liable if negligence causing injury to a subordinate servant could be imputed to the directors, but did not establish any definite rule on the subject. The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal."

In *Harper v. The Indianapolis, etc., R. R. Co.* (47 Mo. 567), 4 Am. Rep. 353, wherein the company was held liable for an injury resulting from their agent's not employing competent servants, WAGNER, J., said: "Corporations can only act through their agents, and when they delegate power to an agent, and he executes that power, it is the act of the company." In the course of a very able opinion delivered at general term of the Supreme Court, Mr. Justice PORTER said, in *Brickner v. N. Y. Cent. R. R. Co.*, 2 Lans. 506 (affirmed by the Court of Appeals, on the authority of *Laning v. N. Y. Cent. R. R. Co.*, *supra*, see 49 N. Y. 672): "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and apply all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all these respects; and, though in the performance of these executive duties he may be and is a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendent may, also, labor like other co-laborers, and may be, in that respect, a co-laborer, and his negligence as such co-laborer, when acting only as a laborer, may be likened to that of any other, yet when, by appointment of the master, he exercises the executive duties of a master—as in the employment of servants, in the selection, for adoption, of the machinery, apparatus, tools, structures, appliances, and means suitable and proper for the use of other subordinate servants—then his acts are executive acts, are the acts of a master, and these corporations are responsible that he shall act with a reasonable degree of care for the safety, security, and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent, within his sphere, may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues *their* orders to *their* operatives. Then he is the mouth-piece and interpreter of their will. Their voice

Lawler v. Androscoggin Railroad Co.

which is silent, is spoken by him. He then only speaks their executive will—not the irresponsible will of a fellow-workman or co-laborer. The corporation can speak and act in no other way. His executive acts are their acts; his negligence is their negligence; his control their control. He has in his executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common co-laborer or co-servant."

In *Ford v. Fitchburg R. R. Co.*, *supra*, it was said: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who engage in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence if the servant is injured; in the other, he may."

In *Brothers v. Cortier*, *supra*, the Supreme Court of Missouri held, that a superintendent who has entire control of any work, with power to employ or discharge workmen, and to provide and remove material, is not a fellow-servant within the meaning of the rule that a master is not liable for injuries to a servant caused by the negligence of a co-servant. In *Corcoran v. Holbrook*, 59 N. Y. 517 (which will be reported in the next volume of this series of reports), the same doctrine was applied to individuals conducting their business through agents. In that case the plaintiff was an employee in defendants' cotton mill, and was injured by a defective elevator therein. RAPALLO, J., delivering the opinion of the court, used this language: "The defendants who operated the mill at the time of the injury gave no personal attention to conducting the mill, but it was managed by a general agent, who had general charge of the mill, machinery and operatives, with power to purchase all supplies, and hire and discharge operatives. It is evident that this general agent was not a mere fellow-servant of the plaintiff, who was a common hand in the mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and the defendants could not, by absenting themselves from the mill, and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties, or from the consequences to perform them. It was the duty of the defendants toward their employees to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employees, who were lawfully and properly and in the performance of their functions in the habit of using it. That duty they delegated to their agent. As to acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of a master, and the latter is deemed present, and liable for the manner in which they are performed. This rule is as applicable to individuals as to corporations."

In *Wonder v. The Baltimore & Ohio R. R. Co.* (32 Md. 411), 3 Am. Rep. 143, ALVEY, J., said: "Who is a fellow-servant within the meaning of the rule has been a question of some diversity of decision, though the decided weight of authority is to the effect that all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants, each taking the risk of the other's

Lawler v. Androscoggin Railroad Co.

negligence." The same rule was more generally stated in *Herd v. Vermont & Canada R. R. Co.*, 32 Vt. 478: "All who are engaged in accomplishing the ultimate purpose in view—that is, the running of the road—must be regarded as engaged in the same general business within the meaning of the rule." See cases cited in note to *Wonder v. The Baltimore & Ohio R. R. Co.*, 3 Am. Rep. 148.

In *Frost v. Union Pacific R. R. Co.*, 2 Dill. 269. Judges DILLON and DUNDY held that the rule exempting the master had no application where a foreman in the employ of a railroad company, having charge of dangerous machinery, ordered an infant employee under him upon a service hazardous to life or limb, and which was not within the scope of the ordinary duties of the servant thus commanded to perform it. This decision was affirmed by the Supreme Court of the United States, in 17 Wall. 558, expressly on the ground that the injury was received while the boy was doing what he had not contracted to do, and DAVIS, J., delivering the judgment of the court, after stating the rule that a servant was presumed to take upon himself the risks incident to the undertaking, said: "But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it." The Supreme Court of Rhode Island held the same doctrine in *Mann v. Oriental Print Works*, to appear in 11 R. I. There, a fireman employed to tend an engine was called upon by the engineer to assist in throwing on a belt which worked a pump used to fill the boiler. The fireman being injured by the belt brought an action for the injury received against the corporation which employed both the engineer and himself; the court held, that if the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time, and of which he was not informed or cautioned, the defendant would be liable.

And, we believe, it may be safely said that the result of judicial opinion in England is to show that where one servant is injured by another, the question is not, whether the two servants were *collaborateurs* or fellow-workmen in any technical sense of the term, but whether the damage was within the risk incident to the service undertaken. The negligence of a fellow-workman engaged upon a common work is commonly accounted among the risks undertaken, but is only a subordinate instance. This was the doctrine of *Wilson v. Merry*, L. R., 1 H. of L. Sc. 326. In that case the plaintiff's son was killed, while in the employ of the defendants as a miner, by an explosion of fire-damp, alleged to have been occasioned by a defective draft in the pit, and it was claimed that the defect in the draft was caused by a scaffold or platform which had been erected in the pit to aid in working the mine. The defendants did not, themselves, take any part in the erection of the platform, nor was any personal fault or negligence of any kind imputed to them. They had a general manager of their mines, and under him was the manager of the pit where the injury happened.—both proved to be competent persons, selected by the defendants with due care and furnished with all the necessary materials and resources for working in the best manner. On the trial the jury was charged that "If they were satisfied on the evidence that the arrangement or system of ventilation in the Houghhead pit at the time of the accident in question had been designed and completed by Neish (the sub-manager), before the deceased was engaged to work in the pit, and that the defendant had delegated to Neish their whole

Lawler v. Androscoggin Railroad Co.

power, authority and duty in regard to that matter, and also in regard generally to all the underground operations without control or interference on their part, the deceased and Neish did not stand in the relation of fellow-workmen engaged in the same common employment, and the defenders were not on that ground relieved from liability to the pursuer for the consequences of fault, if any there was, on the part of Neish in designing and completing said arrangements or system of ventilation." The House of Lords held this charge to be error. The Lord Chancellor (Lord CAIRNS), after quoting from the judgment of Lord CRANWORTH in *Bartonskill Coal Company v. Reid*, 3 Macq. 283, said:

"I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is, in any technical sense, the fellow-workman or *collaborateur* of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule and not the rule itself. The rule, as I think, must stand upon higher and broader grounds—as is said by a distinguished jurist: *Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus.* (*Donelhus de Jure Civ. L. 9, C. 2 n.*) The master is not and cannot be liable to his servant, unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent, personally, to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skillful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant v. Webb*, 25 L. J. (N. S.) O. P. 262, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

Lord COLONSAY said: "Now I agree with what has been said as to the terms fellow-workmen and *collaborateur*. They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organisation that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as 'foreman' or 'manager.' We must look to the functions the party discharges and his position in the organism of the force employed, and of which he forms a constituent part." This doctrine was cited and approved in *Smith v. Steele*, L. R., 10 Q. B. 125. In that case, the defendants were the owners of a vessel lying in dock about to proceed on a voyage, in which the employment of a pilot was compulsory. The

Lawler v. Androscoggin Railroad Co.

testator was a pilot, who was engaged for the voyage. While performing his duty he was killed through the negligence of the defendants' servants. The court held that the pilot did not take upon himself the risk of injury from such a source, and that the defendants were liable.

So in *Howell v. Landore and Stemen's Steel Co.*, L. R., 10 Q. B. 62, the doctrine established in *Wilson v. Merry*, *supra*, was conceded to be settled law. In that case a workman in a colliery was killed by an explosion occasioned by the negligence of the manager of the colliery appointed by the owners under the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 28. Held, that the manager and the deceased were fellow-workmen, and that the owners of the colliery were not liable to an action by the representatives of the deceased under Lord CAMPBELL's Act (9 & 10 Vict. c. 93). It was attempted to distinguish that case from *Wilson v. Merry*, on the ground, among others, that the defendants were a corporation and could only act by a manager. That, however, was not considered to raise any distinction. See, also, *Morgan v. Vale of Neath*, 5 B. & S. 570; affirmed, L. R., 1 Q. B. 149; *Indermaur v. Dames*, L. R., 1 C. P. 274; affirmed, L. R., 2 C. P. 311.

In the case of *Conroy v. Belfast & Northern Counties Ry. Co.*, 9 Ir. L. T. R. 217, recently (1875) decided by the Irish Court of Common Pleas, it was held that the defendant was not liable for an injury to a miles-man occasioned by the negligence of the traffic manager.

In a recent case in the English Court of Common Pleas, *Turner v. The Great Eastern Ry. Co.*, 38 Law Times R. (N. S.) 481, the defendant, a railway company, employed a contractor to unload their coal trucks at shoots on sidings constructed for the purpose. The contractor employed his own laborers, among whom was the plaintiff, whom he engaged and paid, and over whom he had entire control. The plaintiff, while engaged in the work, was injured by the negligent shunting of an engine managed by the servants of the defendants, which was bringing coal trucks on to the sidings to the shoots. Held, that there was no such common employment between the plaintiff and the shunter as would disentitle the former from bringing an action against the defendants for the negligence of their servants. Lord COLERIDGE, in delivering the judgment of the court, said: "The question, then, is, whether the employment was so common between the plaintiff and the shunter who directed the engine, as to bring the case within *Prestley v. Fowler*, 3 M. & W. 1, and establish that the action is not maintainable. The case is a difficult one, as I have said, because it is so near the line; and the line to be drawn is one which it is not easy to state in language, and I will not attempt to give a definition calculated to meet all cases. Each case must depend upon its particular circumstances, and no single circumstance can be stated as being a certain and single test of general application; but several circumstances may, at any rate, be remarked upon, all, or some of which, when they occur, may show what is one side or the other of the line, which is not itself easy to be drawn. The case by which we were here most pressed was *Wiggitt v. Fox*, 25 L. J. 188, Ex., where the defendants, Fox and Henderson, were contractors for the building of the Crystal Palace, and employed Moss to do part of the work by the piece for a certain sum, payable by monthly installments, according to the work done. Moss employed the plaintiff, who was killed by the negligence of the defendants' servants. The Court of Exchequer held, and the decision was not questioned, that the plaintiff could not recover against Fox, because Fox and Henderson were general contractors for the whole work, and the sub-contractor was so far under Fox and Henderson's control as to make his workmen in a common employment with

Lawler v. Androscoggin Railroad Co.

those of the general contractor. That case came under consideration in *Abraham v. Reynolds*, 5 H. & N. 143, in 1860. There, however, the question of common employment did not arise, so far at least as a common employer is concerned, because there a servant going to get bales from a warehouse not belonging to his master, was injured by the negligence of the warehouseman's servant and on the question being raised, could he recover for the injury so caused, it was held that he could. It was held that the facts did not render the employment of the two servants a common one, or give any control to the master of either over both. This was the express ground of MARTIN's, B., judgment, and of his assent to *Wiggett v. Fox*. So, too, WATSON, B., and CHANNELL, B., the latter of whom, commenting on *Wiggett v. Fox*, says: "But it was proved that the deceased was paid by the defendants, and it further appeared by the printed rules which were given in evidence, and by the evidence of Moss, that the defendants had a control over and power to dismiss Wiggett, though engaged by the contractors. The ground on which the judgment proceeded was therefore the payment of the plaintiff by the defendant, and the control exercised by the latter over him, so that he could dismiss him, as put by CHANNELL, B. Now both those grounds are wanting here. The defendants did not pay the plaintiff, and had no control over him so as to be able to engage or dismiss him. So on these two grounds, it seems to me that this case is clearly distinguishable from *Wiggett v. Fox*. Then in *Sadler v. Henlock*, 4 E. & B. 570, which was an action for an obstruction and nuisance on a highway caused by a man whom the defendant had employed to clean out a drain, taking up and improperly replacing part of the highway adjacent to the defendant's land, in which the drain was. The question whether the defendant was answerable to the plaintiff, whose horse was injured by falling into the hole made in the highway, depended on whether Pearson, the man employed by the defendant, was a contractor or a servant. CROMPTON, J., says in the argument:

"Is not this rather a case where the employer maintains a control over the person whom he employs;" and in his judgment, "the real question is, whether the defendant and Pearson stand to each other in the relation of master and servant. I decide not on the ground that Pearson did not employ the hands of another, for if he was the defendant's servant, the defendant would be liable for the wrong-doing of the person whom the servant employed; though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is, whether the defendant retained the power of controlling the work." Now I will not say that this is the only test, but it is put there as the test by which to distinguish whether a man is a contractor or a servant; and so here it would be the test to discover whether Lanesborough was a contractor or a servant, and on this point the report of the judge says that he could engage and pay his own servants. Then, to take it in another way: suppose the situations reversed, and that the plaintiff had negligently caused injury to some one else. It seems to me extravagant to say that such a person could sue the now defendants for such injury. They would say in defense, and, as I think, say unanswerably, we had no control over the man, we did not engage him and could not dismiss him, we are therefore not liable for his negligence. If, then, in such a case an action would not lie against the railway company, it follows that the same ground which would save them there would make them liable here. It is not necessary, in my opinion, to discuss *Murray v. Currie*, *ubi sup.*, there was clearly an independent employment in that case, and the peculiar circum-

Lawler v. Androscoggin Railroad Co.

stances do not make it applicable here. On the whole, therefore, though the cases are cases of difficulty, I think that this is not within the authority of *Wiggett v. Fox*, *ubi sup.*, and if it is not, the action is maintainable, and the plaintiff entitled to his verdict."

In *Gannon v. Housatonic R. R. Co.*, 112 Mass. 234, it is held that the rule that a servant cannot recover of his master for damages sustained from the negligence of his fellow-servant, does not prevent his maintaining an action against his master for consequential damages by him sustained through an injury to his wife. COLT, J., delivering the opinion of the court, said: "The implied contract on the part of the servant, by which he assumes the risk of the negligence of others, has reference to those direct injuries to which he is exposed in the course of his employment. Those injuries which are incident to the nature of his employment, he is presumed to have contemplated, and with reference to his exposure to them, to have fixed the compensation agreed on. In other respects his relation to his employer remains unchanged. He may insist on the performance of all other duties, whether they are such as are imposed by him, or such as arise from independent contracts, express or implied."

Duty of master in selecting competent servants. *Tarrant v. Webb*, 18 C. B. 797; *McMahon v. Davidson*, 12 Minn. 357; *Wright v. New York Central Railroad Co.*, 28 Barb. 80; *Fraser v. Pennsylvania Railroad Co.*, 38 Penn St. 104; *Davis v. Detroit & Milwaukee Railroad Co.* (20 Mich. 106), 4 Am. Rep. 384; *Harper v. The Indianapolis, etc., Railroad Co.* (47 Mo. 567), 4 Am. Rep. 353; *Moss v. Pacific Railroad Co.* (49 Mo. 167), 8 Am. Rep. 126; *Hogan v. Central Pacific Railroad Co.*, 49 Cal. 128.

Master to provide sufficient and proper machinery and materials. *Roberts v. Smith*, 2 H. & N. 213; *Weems v. Mathieson*, 4 Masq. 215; *Searle v. Lindsay*, 11 C. B. (N. S.) 429; *Holmes v. Clark*, 6 H. & N. 349; 7 id. 367; *Britton v. Great Western Cotton Co., L. R.*, 7 Exch. 130; S. C., Moak's Eng. Rep. 381; *Bussell v. Laconia, etc., Co.*, 48 Me. 113; *Cayser v. Taylor*, 10 Gray, 274; *Snow v. Housatonic Railroad Co.*, 8 Allen, 441; *Fyfield v. Northern Railroad Co.*, 43 N. H. 235; *Harrison v. Central Railroad Co.*, 31 N. J. L. 298; *Ryan v. Fowler*, 24 N. Y. 410; *Byron v. State Printing Telegraph Co.*, 26 Barb. 39; *Conolly v. Pottton*, 41 Barb. 366; *Gibson v. Pacific Railroad Co.* (48 Mo. 163), 3 Am. Rep. 497; *Wonder v. Baltimore & Ohio Railroad Co.* (32 Ind. 411), 3 Am. Rep. 143 and note; *Illinois Central Railroad Co. v. Welch* (52 Ill. 133), 4 Am. Rep. 593; *The Chicago & Northwestern Railroad Co. v. Jackson* (55 Ill. 492), 8 Am. Rep. 661; *Patterson v. Pittsburgh & Connellsville Railroad Co.*, 76 Penn St. 339; *Arickson v. Dennison*, 117 Mass. 407.

Master is bound to notify his servant of danger if he has knowledge of it. *Williams v. Clough*, 3 H. & N. 258; *Perry v. Marsh*, 25 Ala. 659; *Coombs v. New Bedford Cordage Co.* (102 Mass. 572), 3 Am. Rep. 506; *Baxter v. Roberts* (44 Cal. 187), 13 Am. Rep. 160, and note.

Where servant has knowledge that machinery is dangerous he assumes the risk. *McGlynn v. Brodie*, 31 Cal. 376; *Hayden v. Smithville*, 29 Conn. 548.

Master is liable for his own negligence or personal interference. *Ormond v. Holland*, El. Bl. & El. 103; *Ashe vs. Starwin*, 3 El. & El. 701; 39 L. J. Q. B. 233; *Roberts v. Smith*, 2 H. & N. 213.—*Emr.*

CAMPBELL V. PORTLAND SUGAR COMPANY.

(88 Me. 532.)

Negligence — Liability for injury to person caused by defect in wharf — agent of owner when responsible — joint action against owner and agent not maintainable.

Plaintiff, the driver of a job wagon, was injured by stepping into a hole in a wharf, while attempting to carry a seaman's chest on board a vessel. The part of the wharf where the accident occurred was leased to A & B by the agents of the owners of the wharf, for the purpose of loading and dispatching vessels, the agents being bound to repair. Persons going to the vessel were compelled by obstructions in other parts of the wharf to take the route which plaintiff took, which was through a shed. *Held*, that the owners and agents were liable for the injury; but that the liability was not joint. A verdict against both was allowed to stand against the agents on the discontinuance of the action as against the owners of the wharf.

Wharf owners and their agents, so long as they keep the wharf open and occupied, or rented for the business of loading and dispatching vessels, are bound to all whom the proffered facilities bring there, to use due care to keep the wharf and its approaches in good condition.

ACTION to recover for personal injuries. The opinion states the case. The damages were assessed by the jury at \$9,500, and at a previous trial the verdict was for \$8,166.

J. & E. M. Rand, for defendants, cited *Sweeny v. Railroad Co.*, 10 Allen, 368; *Elliott v. Pray et al.*, id. 378; *Zoebis v. Tarbell et al.*, id. 385; *Wendell v. Baxter*, 12 Gray, 494; *Gautret v. Egerton*, L. R., 2 C. P. 371; *Collis v. Selden*, L. R., 3 C. P. 495; *Holmes v. Railway Co.*, L. R., 4 Exch. 255; *Carlton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Barrett v. Black*, 56 Me. 504.

Howard & Cleaves, for plaintiff. The defendants were bound to keep the wharf safe for the use of the public. *Wendell v. Baxter*, 12 Gray, 494; *Carlton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Stratton v. Staples*, 59 Me. 94; *Radway v. Briggs et al.*, 37 N. Y. 356; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Gibbs v. Trustees Liverpool Dock*, 3 H. & N. 175; *White v. Phillips*, 15 C. B. 245; *Smith v. London & St. Katherine Dock Co.*, 3 C. P. 326

Campbell v. Portland Sugar Co.

Barnaby v. Lancaster Canal Co., 11 Ad. & El. 223. They were bound to keep it repaired by agreement and by well-settled principles. *Taylor v. Mayor of New York*, 4 E. D. Smith, 559; *Radway v. Briggs*, 37 N. Y. 356. Plaintiff was rightfully on the wharf. *Sweeney v. Old Colony R. R. Co.*, 10 Allen, 374. The defendants were properly joined. *Wright v. Wilcox*, 19 Wend. 343; *Phelps v. Waite*, 30 N. Y. 78.

BARROWS, J. The plaintiff was the driver of a job wagon, and was employed by the mate of a brig, to take the mate's chest aboard the vessel, then lying at Brown's wharf, loaded and nearly ready for sea. Going down to the wharf for this purpose soon after five o'clock, in the afternoon of November 7, 1867, while it was still sufficiently light out doors to see, but duskish enough to require a light in the cabin, after going through a shed near the foot of the wharf, when near the gangway plank with the chest upon his shoulder, he stepped into a hole which had been long before that time worn through the covering of the wharf, and fell, receiving very severe and painful injuries.

The Portland Sugar Company owned the wharf. The other defendants composing the firm of John B. Brown & Sons, were the general agents of the sugar company, and had the whole management of its business, and had charge of the wharf, collecting the rents for the sugar company through the wharfinger, who was employed by the company, bills for rent being made out in the name of J. B. Brown & Sons, and receipted by the wharfinger. At the time of the accident, the part of the wharf where it occurred was occupied by Messrs. Phinney & Jackson, merchants, who hired certain portions of the wharf some months previously, by a verbal arrangement with J. B. Brown, and loaded and dispatched vessels thence, among others, the brig to which the plaintiff was going when he received the injury. The undisputed testimony is, that it was part of the contract of hiring that Brown should keep the wharf in repair. As between the lessors and the lessees no part of that duty rested on the latter. The sugar company's wharfinger spent most of his time upon the wharf, and testifies that "when any repairs were needed on that portion of the wharf hired by Phinney & Jackson, they were generally made by Mr. Brown's carpenter, under my direction, unless there was a large amount to be made, and then Mr. Brown superintended it;" that he did not know

Campbell v. Portland Sugar Co.

that Phinney & Jackson had any control of the repairs; that they did make repairs in several instances, but usually he sent a man when called upon," that he repaired the place where plaintiff was hurt immediately after it was shown to him; that the office of J. B. Brown & Sons was the office of the Portland Sugar Company; that repairs were usually made by carpenters paid by the month, by the sugar company.

Indeed there seems to be no question, that in all that the Messrs. Brown did in relation to the wharf, they acted in their capacity as general agents and managers of the sugar company, who held the title, and received the rents and wharfage. A great many vessels loaded at the wharf that fall, and the way leading down upon it as far as the sheds at the foot of the wharf was open to the public at all times. Phinney & Jackson, however, appear to have had the right to the exclusive use and possession of those portions which they hired; or, in other words, those parts of the wharf were appropriated for their business. The shed through which the plaintiff passed to the brig, was occupied with their merchandise, and the doors on the eastern, or water, side of it were kept closed, except in business hours, during which all the doors were open, and all who had occasion to go to a vessel, lying at or near the end of the wharf, went through them freely. In fact, the only practicable passage way on board a vessel lying where this brig did, when the plaintiff went to take the mate's chest on board, seems to have been through the shed, the way the plaintiff went when this accident occurred. The way down the wharf, outside the shed, seems to have been so obstructed by piles of lumber and cooperage stock, that all who had occasion to go on board a vessel lying at the southerly end or easterly side of the wharf near the end, as matter of necessity went through the shed, when they had any thing to carry. Phinney testifies that it was open to anybody who had business with the vessels lying there, and that seamen's chests were invariably taken through it.

Hereupon the defendants' counsel requested of the court the following instructions, which were either refused, or given with modifications, to be noticed hereafter, viz.: That the action cannot be maintained against all the defendants jointly; that this action cannot be maintained; that, if that portion of the wharf where the accident happened, was leased to Phinney & Jackson, and they had the exclusive possession and control of it, then the defendants are

not liable ; that unless the defendants held out that portion of the wharf where the accident happened, for public use, they are not liable in this action ; that, unless a passage through the warehouse (meaning the shed above spoken of) through which the plaintiff passed was kept by the defendants for public use, the defendants are not liable ; that, if Phinney & Jackson had the exclusive possession and control of the warehouse through which the plaintiff passed, and of that portion of the wharf where the accident happened, and the defendants never in any manner held out to the public the building and the eastern doorway as a public passage, the defendants are not liable ; that, if Phinney & Jackson permitted the plaintiff to pass to the vessel through the warehouse, such permission does not impose any duty or liability upon defendants, and defendants are not liable to plaintiff for any injury sustained by him, in thus passing to the vessel. The judge, among other matters not excepted to, instructed the jury in substance that, to make out a case, the plaintiff must not only show that he was in the exercise of ordinary care and that the defendants had been guilty of negligence, in consequence of which the injury was sustained, but he must also satisfy them that the wharf, and that portion of the wharf where he was injured was devoted to public purposes ; that it was a public thoroughfare ; a passage thrown open to the public, and to which the public were invited, and that inducements were held out to the public to use it as a place of public travel. To this he added : " If you are satisfied that the defendants established the wharf for the use of the public and invited the public to use it for reasonable compensation, then they were bound to keep the wharf safe for the uses for which it was made and rented at that place ; and if the plaintiff being properly on the wharf, in the prosecution of his business, and in the exercise of reasonable care and diligence, sustained the injury alleged through a defect in the wharf, then, the other conditions being fulfilled, the plaintiff is entitled to recover." The requests for instructions previously recited, so far as they tended to relieve the defendants from liability upon the ground that the place where the accident happened was in the possession of Phinney & Jackson, the lessees of the sugar company, or that a holding out of the place where the accident happened, or the passage through the shed as places of public travel by their said lessees, would impose no duty and no liability for negligence upon the

defendants, the judge declined to give—some of them apparently not because he questioned their correctness as abstract rules of law in a case to which they could properly be applied, but because upon the testimony produced they were inapplicable here. For he thereupon instructed the jury that the mere permission of Phinney & Jackson to the plaintiff to pass through would not render the defendants liable,—there must be something more than permission, “there must be a holding out to the public this as a place of public travel.” If there were such a holding out and inducement to the public, he ruled in substance that it made no difference whether it was done by the defendants directly, or by and through their lessees. And he held that the obligation of the defendants to keep the wharf in repair extended to all persons rightfully prosecuting business or work relating to the loading, unloading and dispatch of vessels at that portion of the wharf hired by Phinney & Jackson, as well as to the immediate employees of that firm.

The distinction which runs through the cases between the relations which the owners of real estate bear to those who have been induced to enter upon the property of such owners by an appropriation of it to business purposes and to uses from which such owners derive profit, and the relations which they bear to mere licensees who are suffered, but not invited directly or indirectly, to pass over it at their own will and risk—where there is nothing to raise an implication that the property is fit for the use to which it is put, and that one may use it with confidence that no negligence on the part of him who derives a profit or advantage from such use has made or left it unsafe, was carefully observed at the trial. That a proprietor does not and ought not to stand in the same position with respect to injuries received on his premises toward mere licensees—like the plaintiffs in the cases of *Hounsell v. Smyth*, 97 E. C. L. R. 731, and *Gautret v. Egerton*, L. R., 2 C. P. 371—, as he does toward one who is there by invitation, express or implied, for the transaction of a business out of which the proprietor gets his gain or income, is very certain. That a proprietor who has leased his estate, and is not in the present possession of it, would not be responsible for injuries occasioned to third parties by any use which his tenant might see fit to make of it, foreign to the purpose for which it was let, may well be conceded. If any unwonted or unexpected use of the property which the tenant makes, creates

Campbell v. Portland Sugar Co.

the nuisance, it might well be argued that for such act of the tenant the landlord could not be held responsible.*

But nothing in the instructions given, or in the refusals to instruct, will be found in conflict with the well-settled doctrine of the law, or the most favorable view for the defendants which can be taken of it, so far as either of these points can be deemed involved in the case before us.

The remark in *Holmes v. N. E. Railway Co.*, 4 Exch. 255, is applicable. "The question of a mere license does not arise, for, as soon as you introduce the element of business which has its exigencies and necessities, all idea of mere voluntariness vanishes."

The plaintiff was not a mere licensee. He went to the wharf in the prosecution of his own calling, it is true, but upon business directly connected with that for the transaction of which the wharf was built, and held out by the owners as well to the public as to those more immediately negotiating with themselves, as a safe and suitable place for the transaction of such business.

To all who had occasion to transact such business there, whether with themselves directly, or with their tenants, or with those on board the vessels lawfully lying there by the permission of the proprietors or their tenants, the owners of the wharf owed a duty, their neglect of which has been productive of serious injury.

The act in which the plaintiff was engaged was a necessary and common incident of the business for which the wharf was constructed and let. It is not necessary that the defendant should have had a direct interest in the transaction itself.

In *Tobin v. P. S. & P. R. Co.*, 59 Me. 183, the business of the plaintiff, a hackman, like that of the present plaintiff, was not with the defendants but with the customers of the defendants.

In *Stratton v. Staples*, 59 Me. 94, the plaintiff at the time she received her injury was going to the apothecary shop occupied by the defendant's tenant.

In *Wendell v. Baxter*, 12 Gray, 494, that part of the wharf where the accident occurred was let to the N. & C. C. Steamboat Co., and while it is true that the plaintiff in that case was employed by the lessees to carry the mails from the steamboat to the post-office, the reasoning of the court extends the right and remedy to

* See *Clancy v. Byrne*, 15 Am. Rep. 391, and note; *Leonard v. Storer*, id. 76, and note; *Jaffes v. Hartson*, id. 438; *Shipley v. FVby Associates*, 3 Am. Rep. 348; 3 id. 518; *Fisher v. Thirkell*, 4 id. 422; *Marshall v. Cohen*, 9 id. 170; *Irvine v. Wood*, 10 id. 170.—*REp.*

Campbell v. Portland Sugar Co.

all having lawful business on board the boat, METCALF, J., remarking as follows : " Access over the wharf to the boat and from the boat over the wharf, for the purpose of lading or unlading the boat, was the undoubted right of all persons who had occasion for such access." The same argument was adduced there as here that the defendants could only be bound to keep the wharf in repair in favor of those with whom they as owners contracted or dealt, and that they had no contract with the plaintiff. And the same accurate and careful judge remarks thereupon : " But the plaintiff's right of action accrues from the duty which the law imposed on the defendant, to keep their wharf safe so long as they should permit it to be open and used, and not from any contract between them and him."

In *Smith v. London & St. Katharine's Dock Co.*, L. R., 3 C. P. 326, the question was raised under circumstances even less favorable for the plaintiff than those in the case at bar. The plaintiff there was an optician, and had gone on board a vessel lying in defendants' dock, at the request of an officer of the vessel, to exhibit some nautical instruments, presumably with an eye to trading in his own wares. It was argued, in defense, that he was not on board on the ship's business, or any business in which the proprietors of the dock were interested ; that the contract for supplying access to the ship was with third parties, and did not affect the plaintiff's rights ; but the court held defendants liable, maintaining in full the doctrine that all persons coming to the vessel upon any lawful business would have the same right to safe access and egress as the passengers and crew of the vessel itself ; and the chief justice remarked that " it is not one person in ten who goes on board a ship in a dock for the purpose of transacting business in which the dock company are interested, in any other sense than that he goes upon the business of the vessel or of those on board," and that " the dock company were paid for the use of the access to the ship, not necessarily by every person who goes there, but by the owners of the ships in behalf of all who use it."

This is not a question of privity of contract, but of obligation under which the owners of real estate lie to all who are induced by the use which such owners make of their property to enter upon it for the transaction of business. And we fail to find any case where the owner has been exonerated from the consequences of neglect to

make and keep the access to a place of business reasonably safe, because the property may be in possession of his tenant.

Certainly there can be no ground for claiming such exemption, where, as here, by express stipulation between the lessors and lessees, the former were to make all necessary repairs. To suffer such an exemption, even in the absence of such evidence as this case affords, we think would be contrary to public policy and substantial justice, for it would not unfrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities of his proprietorship. Like all who are engaged in business which involves the personal safety of large numbers, proprietors of wharves should be held to the exercise of the strictest care. *Pittsburg v. Grier*, 22 Penn. St. 54.

A wharf used for the loading and discharge of the cargoes of vessels is in its very nature a passage way over which, in all directions, the exigencies of business may take those people who have business to transact in connection with the vessels and those on board of them. To suffer a man-trap like this hole into which the plaintiff stepped, to remain as this had done for months, until an accident had demonstrated the necessity of replacing the worn-out covering, might well be deemed a want even of ordinary care. The opening a way through the shed, when other access to the vessel lying there was prevented by piles of lumber, was no such unusual use of the property by the tenant, as would in any manner affect the liability of the owner. Had the accident occurred in the shed itself (which was not the case), it would still have been in a passage to which the plaintiff had been impliedly invited in the prosecution of the common business. The wharfinger of the sugar company spent most of his time upon the wharf. He must have been cognizant of the uses which Phinney & Jackson were making of the parts appropriated to their business; and such uses must have been contemplated by the lessors when they rented those parts.

The business to be done was the loading and unloading of vessels, including, necessarily, the transportation to and from them, not only of seamen's chests, but of all such articles as make up their multifarious outfit for sea voyages. A covering to the wharf that would be secure in any and all parts of it for the varying exigencies of such business, was an imperative necessity, and the wharf proprietors, so long as they kept the wharf open, and occupied or

Campbell v. Portland Sugar Co.

rented it for such business, were bound as to all whom the proffered facilities should bring there, to use due care to furnish it.

Vessels frequently change their position at a wharf for their own convenience, or that of others, and all parts of the wharf where they are allowed to lie, which are not actually covered by closed structures, are liable to come in use as ways of access, and due care should be used by the owners for the security of those having business there accordingly.

Apparently the request that the jury should be instructed that this action could not be maintained, was based upon the positions taken by the defendants (which we have been considering) with regard to the effect of the occupation of that part of the wharf where the accident happened by Phinney & Jackson, and the holding out of the particular spot as a way of access to vessels. The instruction was rightly refused. The renting of the property by the defendants for the purposes for which it was rented and used, imposed a duty upon them as to all who were induced to come upon the wharf upon lawful business connected with the purposes and uses for which it was let. That the occupier, as well as the owner, the tenant as well as the landlord, who directly, or by implication, induces persons to enter upon and pass over his premises, might also be subject to the action of a person injured by reason of his neglect to use due precautions for their safety, cannot better the position of the defendants. So long as the owner will receive his rents for the use of his wharf for such business, he must see to it that no neglect brings mischief to those who are thereby induced to go there.

The corporation is answerable for its constructive negligence, or perhaps (to speak more exactly) on the principle of *respondet superior*, and must be held, as Lord KENYON remarked, 1 East, 108, "to make a compensation for the damage consequential from the employing of an unskillful or negligent servant."

The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partner, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal.

It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and

when their acts or neglects result in injury to third parties, they are equally responsible with their principals.

But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons assigned in *Parsons v. Winchell*, 5 Cush. 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury.

The proper adjustment of the final responsibility as between themselves cannot well be effected if one who has distinct grounds of action against them — against the agents for their own negligence — against the principals because the law makes them responsible for the negligence of their servants — is permitted to recover against both in one suit. The distinction between actions on the case arising from negligence, and actions of trespass, where the wrong is inflicted at the command of the superior, in this respect is well marked, and goes somewhat deeper than mere form.

But if it were found that there was no other cause of complaint by this misjoinder, the objection might ordinarily be obviated, as it was in the case of *Hewett v. Swift et al.*, 3 Allen, 420, by entering a discontinuance as to the corporation before taking judgment against the agents, or *vice versa*, as the plaintiff should elect.

In the present case, however, it is thought by some members of the court, that the proof of certain declarations made by one of the firm of J. B. Brown & Sons, may have tended to enhance the damages, and that, therefore, the plaintiff should be required to discontinue against the corporation, which might otherwise be injuriously affected by evidence which was admissible only against the co-defendant. When this has been done at *nisi prius*, the substantial ground of objection and exception, so far as the other defendants are concerned, will have been removed.

The plaintiff's right to maintain his suit severally against the corporation which owned the wharf, and against their agents, is established, unless the verdict ought to be set aside as against the evidence, on one or other of the grounds relied on in argument by the defendants' counsel.

They insist that the plaintiff did not exercise due care — that he might and should have seen the hole into which he stepped. But it does not seem to us very decisive evidence of a want of ordinary care that, engaged in such a business, and loaded as he was, in the

 Emery v. Hobson.

waning twilight of a November day, he failed to observe a hole no larger than this, in a place where he had a right to expect, and where, but for the dereliction of the defendants, he would have found secure footing.

Again, they urge that the damages are excessive. It is difficult to measure excessive pain against money. The two juries have passed upon the question in this case with substantially the same result. We are not prepared to say, upon the evidence before us, that the estimate thus reached by different men, acting impartially under oath, is so clearly unjust as to warrant us in setting aside the verdict, and sending the plaintiff to a third trial. When he shall have discontinued against the sugar company in the court below, he will be entitled to judgment on the verdict against the remaining defendants. Upon the removal of that objection, the entry will be,

Motions and exceptions overruled.

APPLETON, C. J., WALTON, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

EMERY V. HOBSON.

(22 Me. 573.)

Action for money paid — when indorser of check liable.

Plaintiff loaned Hobson money and received therefor the check of Hobson with defendant as indorser, the indorsement containing the words, "waiving demand and notice." Defendant had no interest in the transaction, but knew what the check was given for. Plaintiff did not present the check at the bank for payment until a year had elapsed and Hobson had become insolvent. *Held*, that an action for money paid to defendant's use would lie; and that defendant was not entitled to any demand on the maker, or notice of non-payment.

ACTION for money paid to defendant's use. The facts are these: Plaintiff made a loan of \$5,000 to Joseph Hobson, receiving therefor the latter's check, which, at plaintiff's request, was made payable to the order of defendant. After obtaining the loan, Joseph Hobson requested defendant to go to plaintiff's office and indorse

the check, telling him what had been done. Defendant accordingly indorsed the check and, at plaintiff's request, wrote over his name the words "waiving demand and notice." Defendant had no pecuniary interest in the transaction. The check was not presented at the bank upon which it was drawn until more than a year had elapsed, when payment was refused, Joseph Hobson having become insolvent. There was no demand upon either the maker or indorser before bringing the suit, and no notice of non-payment. The question is whether this action is maintainable.

William L. Putnam, for plaintiff.

Edwin B. Smith, for defendant.

APPLETON, C. J. This is an action of assumpsit against the defendant, for so much money paid and expended by the plaintiff to the use of the defendant, at his request. To support the declaration, the plaintiff introduced a check, signed by Joseph Hobson, payable to the defendant or his order, and by him indorsed "waiving demand and notice," payment of which had been refused.

The check was given for a loan of money by the plaintiff, to Joseph Hobson, in which the defendant had no interest.

It is objected that here was not a payment, but a loan, and that no prior existing liability was thereby discharged, and, therefore, that this action is not maintainable.

In *Lewis v. Campbell*, 14 Jur. 396, it was held, in order to maintain an action for money paid, that it is not necessary that the defendant should be relieved, by the plaintiff's payment, from a liability to a third person. In *Brittain v. Lloyd*, 14 M. & W. 762, it was argued that this form of action could not be maintained unless the effect of the payment was to relieve the defendant from some liability for the amount to the party to whom payment was made, and that otherwise it could not be "money paid for the defendant's use;" and reliance was placed upon the case of *Spencer v. Parry*, 3 Adol. & Ell. 331, to sustain this proposition, and we have been referred to the same authority by the learned counsel for the defendant in the present case. Referring to that case, Pollock, C. B., says: "This proposition, however, is not warranted by the decision of *Spencer v. Parry*, though some expressions in the report of the judgment give a countenance to the argument of the learned

Emery v. Hobson.

counsel ; nor can the proposition be maintained ; for it is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered as a count for money paid ; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him ; on which two latter suppositions the defendant is relieved from no liability by the payment. * * In every case, therefore, in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable."

The payment to Joseph Hobson is fully proved. The request to pay, and the promise to repay is inferable from the defendant's indorsement. The indorsement was made with a full knowledge of all the facts, and before the plaintiff received the check as a completed contract. The loan to the maker of the check is alike the consideration for his signature as for that of the indorser. No other consideration is necessary than the loan to the maker thus made, upon the joint credit of the parties to the check. *Bickford v. Gibbs*, 8 Cush. 154 ; *Colburn v. Averill*, 30 Me. 310 ; *Simons v. Steele*, 36 N. H. 73.

The defendant indorsed the check "waiving demand and notice." An indorser who waives demand and notice is not entitled to any demand on the maker and notice of non-payment. *Woodman v. Thurston*, 8 Cush. 157.

Defendant defaulted.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

LOVINGSTON, appellant, v. THE COUNTY OF ST. CLAIR.

(64 Ill. 56.)

Accretions — title to, when formed by alluvion — alluvion from artificial causes.

The proprietor of lands bounded by a stream of water is entitled to all accretions thereto, caused by the deposition of alluvion thereon, without regard to the question of whether such accretions were formed solely by natural causes, or by such causes influenced by the artificial works of others, and without regard to the question whether such stream is navigable or not. (*See notes, p. 524.*)

Construction of a grant bounded on a stream, see Note.

EJECTMENT by the county of St. Clair against Lovington and the Wiggins Ferry Company, for the recovery of a tract of land in St. Louis, bounded on one side by the low-water mark of the Mississippi river. The plaintiff claimed title under an act of Congress, of July 15, 1870, granting and donating swamp and overflowed lands of the United States. The jury found for the plaintiff.

Wm. H. Underwood and Davis & Thomas, for appellants.

G. & G. A. Kærner and Louis Houck, for appellee.

Lovington v. The County of St. Clair.

THORNTON, J. If the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.

The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the inquiry as to whether the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case, the only question is, have the United States, or the State, or the riparian owner, the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway, like the Mississippi, floating an immense commerce, and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river as well as for the land. Can it be presumed that the United States would make grants of lands bordering upon the river, with its turbulent current, and subject to constant change in its banks by alluvion upon the one side and avulsion upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river, he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to undertake, under such circumstances, to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizen would entitle it.

We then assume that the act of Congress of 1796 (1 Stat. 468, § 9), which declares all navigable rivers in a certain district, public highways, has no bearing upon the questions to be considered. The riparian owner has a right to the alluvion, whether the stream be navigable or unnavigable.

Blackstone says (2d book, 262), as to lands gained from the sea by alluvion, where the gain is by little and little, by small and im-

 Lovington v. The County of St. Clair.

perceptible degrees, it shall go to the owners of the land adjoining. "For *de minimis non curat lex*; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal condition for such charge or loss."*

The same reasoning applies, with all its force, to the lands abutting on the Mississippi river.

In *Middleton v. Pritchard*, 3 Scam. 510, this court said: All alluvions belong to the riparian proprietor, both by the common and civil law.

In the case of *The King v. Lord Yarborough*, 3 Barn. & Cress. 91, land gained from the sea by alluvion or projection of extraneous matter, whereby the sea was excluded and prevented from overflowing it, was adjudged to be parcel of the demesne lands of the adjacent manor.

The question has been discussed with profound research and great ability by the courts in Louisiana, as to the accretions upon this same river, and the law clearly announced.

* In *Attorney-General v. Chambers*, 4 De G. & J. 55, Lord CHILMSFORD, referring to this passage in Blackstone, says: "I am not quite satisfied that the principle '*de minimis non curat lex*' is the correct explanation of the rule on this subject; because although the additions may be small and insignificant in their progress, yet, after a lapse of time by little and little, a very large increase may have taken place which it would not be beneath the law to notice; and of which, if the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron ALDERSON in the case of the *Hull and Selby Railway Company*, 5 M. & W. 327, viz: 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' and, as Lord ABINGER said in the same case: 'The principle' as to the gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property. It must be always borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land he loses so much of his property which is thus silently transferred by the law to the proprietor of the sea shore.' If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law; and still more so if these effects are the result of operations upon neighboring lands of another proprietor; whatever may be the nature and character of these operations they ought not to affect a rule which applies to a result and not to the manner of its production. Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated but can be shown to have been intended, to produce this gradual acquisition of the sea shore, however difficult such proof of intention may be."—REP.

Lovington v. The County of St. Clair.

In *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, it was declared that the right to future alluvial formations was a right inherent in the property, an essential attribute of it, the result of natural law, in consequence of the local situation of the land; that cities as well as individuals had the right to acquire it, *pore alluvionis*, as riparian proprietor; and that the right was founded in justice, both on account of the risks to which the land was exposed, and the burden of protecting the estate. The court further assimilated the right to the right of the owner of lands to the fruits of a tree growing thereon, and said: "Such an attempt to transfer from the owner of the land to the city the future increase by alluvion, would be as legally absurd as if the legislature had declared that, after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."

The same principle was declared in *Banks v. Ogden*, 2 Wall. (U. S.) 57, as applicable to Lake Michigan.

See, also, *The Mayor, etc., of New Orleans v. The United States*, 10 Peters, 662; *Jones v. Souldard*, 24 How. (U. S.) 41.

The same doctrine is fully declared in a recent case: *Warren v. Chambers*, 25 Ark. 120.

To determine the title to the accretion, we must ascertain the locality of the land of the adjacent owner. We need not enter upon a discussion of the laws of Congress and of the State, by virtue of which the county claims title, if the land previously granted by the United States was bounded by the river, and the accretion is attached to it.

Hilgard, the surveyor, testified that the accretion was all west of the Condaire tract. The only portion of the field notes we desire to call attention to is the following: "To a post on the westerly side of the river L'Abbe, or Cahokia creek, thence down the said river or creek, with the different courses thereof," and, "thence N. 85 deg. W. 174 poles to a post on the bank of the Mississippi river, from which thence N. 5 deg. E. *up the Mississippi river and binding therewith*" (passing the south-westerly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post north-westerly corner of Nicholas Jarrot's survey No. —, claim No. 100." This survey was made in 1815. From the copy of the plat of it, from the custodian of the United States surveys, it will be seen that the line along Cahokia creek meanders

Lovington v. The County of St. Clair.

with the stream, which was sinuous, and hence the call in the notes, "down the said creek with the different courses thereof."

A further examination of the plat will show that, though the line from "a post on the bank of the Mississippi river," "to a post north-westerly corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river bank, as indicated by the plat, was also straight in 1815. The Condaire survey embraces three militia claims, which had been surveyed before, and which were confirmed to Jarrot.

One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, etc.

The defendants traced title from patents confirmatory of these several surveys, and they also proved title to "Bloody Island," which, when surveyed in 1824, was three-fourths of a mile north of the tract in controversy.

In behalf of the county, it is assumed that the patent to survey 579 contains no indication that the river is the boundary; that the west line of the Condaire claim, being the line next to the river, is identical with the west line of the militia claims; that Condaire took no portion of the militia claims, but only the fractions east of them and between them and Cahokia creek; that the lands granted were bounded by specific lines, and not by the river, and therefore the grants are limited grants, and the land in dispute is outside of their boundary lines.

Concede that the Jarrot survey did not make the river the boundary, by specific call, yet its beginning was on the bank of the river opposite St. Louis, and thence it followed the river to a point in it. Hilgard testified that this survey was on the old bank of the river. It is then evident that at this time, which was some years prior to the Condaire survey, there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness tree, a sycamore, 260 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded by the river or on the river, can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

A large number of cases have been cited by one of the counsel

Lovington v. The County of St. Clair.

for the county, to establish that a grant is not carried to the center of a stream, but stops at the bank, if the grantor describes the line as upon the margin, or at the edge or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river.

This may be good law, and not affect the right of the defendants. They do not claim the bed of the stream, and the proof shows that the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river, or interfere with its free navigation and use by the public.

But the Condaire survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia creek, but the land, if any, between their western line and the river. The Condaire survey run up the river and binding therewith, and *passed* the south-westerly corner of the Jarrot survey, No. 579, *at 6 poles*. Language could not make it more plain that the western line was bounded by the river, and the plats confirm this view.

The only construction to be given to those grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost endless litigation must ensue from the frequent changes in the current of the Mississippi, and the continual deposits upon one or the other of its banks; the value of land upon its borders would depreciate, and the prosperity of its beautiful towns and cities would be seriously impaired.

Counsel say, at the time the locations were made there was no advantage of river front, no wharfage and no wood-yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the States bordering upon it, in the grand future soon to be unfolded. They must have seen the necessity, and accepted the grants for the purpose of securing an approach to the river.

From the proof, before 1819 a ferry was established across the river near to the land in dispute, and has been since in constant operation. Before the grant of the swamp and overflowed lands to the State, in 1850, a city had sprung up on the Missouri side of

the river, and a prosperous village was growing on the Illinois shore. Before the survey by the county of the swamp lands, in 1852, a charter for a railroad had been granted by the State, which resulted in the construction of a road from Terre Haute, in the State of Indiana, to Illinoistown. Prior to the grant made by the United States in 1870, as shown by the plat offered in evidence, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks recently made.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the father of waters. Their absolute necessity, and consequent construction, as an outlet for our immense produce, had been known for more than a quarter of a century before their completion. Their usefulness would be greatly crippled, and the public thereby seriously suffer, if ready access to the river was denied.

It would be a strained construction, to hold that, in making these grants, the United States reserved all accretion, and thus to deprive these proprietors of ferry privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial, and not natural, means. It is not at all certain, from the proof, that the accretions were entirely the result of artificial structures, or that they would not have been formed without them. The construction of coal dykes facilitated the formation, and the soil was prevented from washing away by the expenditure of money by the ferry company.

Jonathan Moore, who had known the river since 1813, testified that the accretions had commenced to form before the construction of the dykes, and McClinock and Jarrot testified to the same effect.

Concede, however, that the dykes, to some extent, caused the accretions; they were not constructed for such purpose, and appellants had nothing to do with their erection. They were built for the accommodation of the public, and to secure an approach to the ferry boats, and the city of St. Louis did some work to preserve its harbor. Improvements were also made by the United States to throw the channel of the river toward the city.

The fact that the labor of other persons changed the current of

the river, and caused the deposit of alluvion upon the land of appellants cannot deprive them of a right to the newly made soil.

Chancellor KENT, after declaring the common-law doctrine, that grants of land bounded on the margins of rivers, carry the exclusive right of the grantee to the center of the stream, unless there is a clear intention to stop at the edge, says: "The proprietors of the adjoining banks have the right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement; and neither the State nor any other individual has the right to divert the stream and render it less useful to the owners of the soil." 3 Com. 427.

If portions of soil were added to real estate already possessed, by gradual deposition, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the State nor any other individual can divert the water from him, artificial structures, which cause deposits between the old and new bank, should not divest him of the use of the water. Otherwise, ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it.

In *Godfrey v. The City of Alton*, 12 Ill. 29, the public landing had been enlarged and extended into the river, both by natural and artificial means, and this court held that the accretions attached to and formed a part of the landing.

In *New Orleans v. The United States*, 10 Peters, 662, the quay had been enlarged by levees constructed by the city to prevent the inundation of the water, and the court held that this did not impair the rights of the city to the quay.

In *Jones v. Soulard*, *supra*, the intervening channel between the island and the Missouri shore had been filled up, in consequence of dykes constructed by the city, and the riparian owner succeeded.

In the case at bar, the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor, and to prevent the channel from leaving the Missouri shore, threw rock into the river, and the coal dykes were made to afford access to boats engaged in carrying across the river.

Lovington v. The County of St. Clair.

The ferry company protected such accretions by an expenditure of labor and money.

The accretions, then, are partly the result of natural causes and structures and work erected and performed for the good of the public. Appellants should not thereby lose their frontage on the river and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

The judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

NOTE.—Upon appeal to the Supreme Court of the United States the foregoing judgment was affirmed, and the following opinion of the court was pronounced by Mr. Justice SWAYNE, after stating the facts:

Two questions are thus presented for our determination:

One is, whether the river line was the original west boundary of the surveys, or either of them?

The other, if this inquiry be answered in the affirmative, is, to whom the accretion belongs.

The first is a mixed question of law and fact. The second is a question of law.

Before entering upon the examination of the first of these questions, it may be well to advert to a few of the leading authorities apposite to this phase of the case. It is a universal rule that course and distance yield to natural and ascertained objects. *Preston's Heirs v. Bowmar*, 6 Wheat. 580. A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance. *Newsom v. Prior's Lessee*, 7 Wheat. 7. Artificial and natural objects called for, have the same effect. *Barclay et al. v. Howell's Lessee*, 6 Pet. 499; *Baxter v. Evert's Lessee*, 7 Monr. 333. In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decision of the State tribunals. *Preston's Heirs v. Bowmar*, *supra*. A patent called "to begin on the Ohio river, and then for certain courses and distances, without any courses or marked lines to the mouth of the Kennebec, and then certain courses and distances, without any corners or marked lines, to a stake in the Ohio river." If the river was the boundary, the land in controversy was within the patent. If the courses and distances prevailed, the patent did not affect it. The court said: "It is our opinion that the river is the boundary." It was added: "two of the calls are on the river." There are no intermediate marked lines or corners. The general description is "to lie on the Ohio." These facts alone would not leave room for any other construction of the patent. *Bruce v. Taylor*, 2 J. J. Marsh. 160. This case is very instructive, and contains much additional argument in support of the view expressed. *Cockrell v. McQuinn*, 4 Monr. 62, is to the same effect. In the latter case the court said: "None will pretend that the legal construction of a patent is not a matter proper for the decision of the court whose province it is to decide all questions of law." In *Bruce v. Morgan*, 1 B. Monr. 26, the rule laid down in *Bruce v. Taylor*, *supra*, was re-affirmed. Where a survey and patent show a river to be one of the boundaries of the

 Lovington v. The County of St. Clair.

tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract. *Churchill v. Gundy*, 5 Dana, 100. Where a deed calls for a corner standing on the bank of a creek, "thence down said creek with the meanders thereof," the boundary is low-water mark. *McCulloch's Lessee v. Aten*, 2 Ohio, 309. See, also, *Handley's Lessee v. Anthony*, 5 Wheat. 380. Where a deed calls for an object on the bank of a stream, "thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning," the stream at low-water mark is the boundary. *Lamb v. Ricketts*, 11 Ohio, 311. Where the line around the land was described as "running to a stake at the river, thence on the river N. 6 deg. 40 min. 23 perches, thence N. 29 deg. 50 min., W. 33 perches, thence N. 20 deg. 20 min. 35 perches and 8 links to a stake by the river," it was held that this description made the river a boundary. *Ritz v. Johnson*, 5 N. H. 520.

Where premises above tide-water are described as bounded by a monument standing on the bank of the river, and a course is given as running from it down the river as it winds and turns to another monument, the grantee takes *usque flum aquæ*, unless the river be expressly excluded from the grant by the terms of the deed. *Luce v. Carley*, 24 Wend. 451.

The eastern line of the city of St. Louis, as was incorporated in 1807, is as follows: "From the Sugar Loaf east to the Mississippi, from thence by the Mississippi to the place first mentioned." This court held that the call made the city a riparian proprietor upon the river. It was said in this connection that "many authorities resting on adjudged cases have been adduced to us in the printed argument, presented by the counsel for the defendant in error, to show that, from the days of Sir Matthew Hale to the present time, all grants of land, bounded on fresh-water rivers, where the expressions designating the water line are general, confer proprietorship on the grantee to the middle of the stream, and entitle him to the accretions. We think this, as a general rule, too well settled, as part of the English and American law of real property, to be open to discussion." *Jones v. Souldard*, 24 How. 44. See, also, *Schumier v. St. Paul*, 10 Min. 330, and *Shelton et al. v. Maupin*, 16 Mo. 121.

It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise. Whether in the present case the limit of the land was low water, or the middle thread of the river, is a question which does not arise, and to which we have given no consideration. The point was considered in *Railroad v. Shumier*, 7 Wall. 287.

Survey 579 is the elder one. Its calls are: "Beginning on the bank of the Mississippi river opposite to St. Louis, from which the lower window in the U. S. storehouse in St. Louis bears N. 70½ W.; thence S. 5 west, 160 poles to point in the river from which a sycamore 20 inches in diameter bears S. 85 E., 250 links; thence S. 85 E., 130 poles (at 30 poles a slash) to a point; thence N. 15 W., 170 poles to a forked elm on the bank of Cahokia creek; thence N. 85 W. 76 poles to the beginning." It will be observed that the beginning corner is on the bank of the river. The second corner is a point in the river. The line between them is a straight one. Where the course as described would have fixed the line does not appear. There was an obvious benefit in having the entire front of the land extended to the water's edge. There was no previous

 Lovington v. The County of St. Clair.

survey or ownership by another to prevent this from being done. No sensible reason can be imagined for having the two corners on the river, and the intermediate line deflect from it. Under the circumstances we cannot doubt that the river was intended to be made, and was made, the west line of the survey. In the light of the facts such is our construction of the calls of the survey, and we give them that effect.

The calls of survey No. 786, as respects this subject, are: "Thence N. 85 deg. W. 174 poles, to a post on the bank of the Mississippi river, from which, thence N. 5 deg. E., up the Mississippi river and binding therewith (passing the south-westerly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post north-westerly corner of Nicholas Jarrot's survey, No. —, claim No. 100, from which a sycamore 35 inches dia. bears S. 21 deg. W. 29 links; thence S. 85 deg. E. with the upper line of the last-mentioned survey 88 poles to the beginning."

Here the calls as to the river are more explicit than in survey No. 579.

The language, "up the Mississippi river and binding thereon," leaves no room for doubt. Discussion is unnecessary. It could not make the result clearer. The river must be held to have been the west boundary of this survey also. In reaching these views we pervert no principle of law or justice. Our conclusions are sustained by authority and reason.

This brings us to the consideration of the second question.

It is insisted by the learned counsel for the plaintiff in error that the accretion was caused wholly by obstructions placed in the river above, and that hence the rules upon the subject of alluvion do not apply. If the fact be so, the consequences do not follow. There is no warrant for the proposition. The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural, or effected by artificial means, is immaterial. *Halsey v. McCormick*, 18 N. Y. 150; 3 Washb. on Real Prop. 48.

The law in cases of alluvion is well settled. In the Institutes of Justinian it is said: "Moreover the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time." Lib. II, tit. I, § 20. The surveys here in question were not within the category of the *agri limitati* of the civil law. The latter were lands belonging to the State by right of conquest and granted or sold in plats. The increase by alluvion in such cases did not belong to the owner of the adjoining plat. D. XLI, 1, 16; Sanders' Inst. 177. See also *Morgan v. Livingston*, 6 Mart. (La.) 251.

The Code Napoleon declares: "Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream is denominated 'alluvion.' Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats or not; on the condition, in the first place, of leaving a landing place or towing-path conformably to regulations." Book II of Property, etc., § 553.

Such was the law of France before the Code Napoleon was adopted. 4 Nouv. Diction. de Brillon. 278; *Morgan v. Livingston et al.*, 6 Martin, 243.

And such was the law of Spain. Parted. III, tit. XXVIII, Law 28.

Blackstone thus lays down the rule of the common law: "And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks below the usual water-marks; in these cases the law is held to be that if the

Lovington v. The County of St. Clair.

gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and beside, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry." 2 Com. 232. See also Woolwich's Law of Waters, 34; and Shultes' Aquatic Rights, 116.

Blackstone takes his definition from Bracton, lib. 2, cap. 2. Bracton was a judge in the reign of Henry III, and the greatest authority of his time. Hale, in his *De Jure Maris*, says Bracton followed the civil law. Hale himself shows the great antiquity of the rule in the English law. *De Jure Maris*, 1st part, ch. 6. See also *The King v. Lord Yarborough*, 1 Dow & Clark, App. C. 187.

Chancellor Kent, the American commentator, recognizes the rule as it is laid down by the English authorities referred to. 3 Kent's Com. 438. By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. *Martin v. Waddle*, 16 Pet. 307; *Russel v. The Jersey Co.*, 15 How. 426. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones. *Pollard's Lessee v. Hagan et al.*, 3 How. 512; *Pollard v. Kibbe*, 9 id. 471; *Hallet v. Bute*, 13 id. 25; *Withers v. Buckley*, 20 id. 84.

The question here under consideration is not a new one in this court. In *New Orleans v. The United States*, 10 Pet. 662, it was said: "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way, he cannot be held accountable for his gain."

To the same effect are *Saulett v. Shepherd*, 4 Wall. 502, and *Schools v. Risley*, 10 id. 110.

In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference; the result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "*qui sentit onus debet sentire commodum*" lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not

The People v. Wilson.

overflow their banks, and where dykes and other defenses are, and where they are not, necessary to keep the water within its proper limits. 3 Washb. on Real Prop. 48; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 123. In England the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea. *The King v. Lord Yarborough*, 3 Dow & Clark's Ap. Cas. 178.

We may well hold that the adjudications of this court to which we have referred are decisive of the case before us. They are binding upon us as authority. We are of the opinion that the United States never had any title to the premises in controversy, and that nothing passed by the several acts of congress and of the legislature of Illinois, relied upon by the plaintiff in error.

The judgment of the Supreme Court of Illinois is affirmed.

Judgment affirmed.

THE PEOPLE v. WILSON.

(34 Ill. 198.)

Contempt — what constitutes — power of the court to punish therefor. Publications — disclaimer by publisher.

Contempts are of two kinds, direct and constructive; a direct contempt is one offered in the presence of the court while sitting judicially; a constructive contempt is one which tends to obstruct and embarrass a court, though the act be not done in its presence.

The publication of an article by any person, even in a newspaper at a place remote from that where the court is being held, concerning a case pending in court, and which has a tendency either to prejudice the public, to corrupt the administration of justice, to influence the court by a threat of "popular clamor," or to reflect on the tribunal, the parties, the jurors, the witnesses or the counsel, *held* a contempt of court and punishable as such by a process of attachment.

The power to punish contempt is original with all courts of justice, and is determined by the principles of the common law and is not limited by existing statutes.

All acts which impede, embarrass or obstruct a court of justice, or which tend to produce such effects, whether done in or out of court, are to be considered as done in the presence of the court, and are punishable as contempts.

The meaning and intent of a published article are to be determined by a fair interpretation of the language used, and are matter of law for the court as to whether or not they constitute contempt, and any disclaimer on the part of the publisher as to any intentional disrespect to the court, is not a sufficient ground for discharging a rule to show cause why an attachment should not issue.

Where a party is under a rule to show cause why an attachment should not issue against him for contempt, a mere excuse, without appearance, is no sufficient ground for discharging the rule, and will only affect the question of punishment.

The People v. Wilson.

PROCEEDINGS for contempt.
The opinion states the case.

Washington Bushnell, Attorney-General, for people.

Beckwith, Ayer & Kales, for respondents.

LAWRENCE, C. J. The respondents, Charles L. Wilson and Andrew Shuman, have been placed under a rule to show cause why an attachment should not issue against them for contempt. The information filed by the attorney-general, upon which the rule was made, sets forth that one of the respondents is the proprietor, and the other the chief editor, of a newspaper published in the city of Chicago, called *The Chicago Evening Journal*, and presented, as a ground for this proceeding, an editorial article published in that paper on the 16th day of October. The article was set out at length in the information. It is entitled "The case of Rafferty." Rafferty had recently been tried for murder, in Cook county, found guilty and sentenced to death. A writ of error, staying the execution of the sentence until the further order of this court, had been granted, and this writ of error was pending and undetermined before us at the date of the publication. The article published is as follows:

"THE CASE OF RAFFERTY."

"At the time a writ of *supersedeas* was granted in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the Supreme Court and decided at once — that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riff-raff who contributed \$1,400 to demonstrate that 'hanging is played out,' may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this, in spite of all our public meetings, resolutions, committees, virtuous indignation, and what not. And why? Because the sum

of \$1,400 is enough nowadays to enable a man to purchase immunity from the consequences of any crime.

"If next winter's session of the legislature does not hermetically seal up every chink and loophole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our mode of procedure in murder trials. The criminal should be tried at once, and when found guilty, should be hanged at once—and the quicker hanged the better. The courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession—who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There *can* be found a remedy, and it *must* be found."

To the rule granted upon the motion of the attorney-general, the respondents have severally answered under oath. They have declined to argue the case, either orally or in writing, though opportunity has been allowed for that purpose.

The respondent Wilson admits, in his answer, that he is the proprietor of the newspaper, but denies all knowledge of the article prior to its publication. While this fact should influence the degree of the punishment to which he may be liable, it does not exonerate him from responsibility. The respondent Shuman admits he is the editor-in-chief. He denies the authorship of the article, but says he read it before its publication, and permitted it to be published. Both respondents disavow any intentional disrespect to the court, or any design to embarrass the administration of justice, and insist that they have the right to examine the proceedings of every department of the government of this State, and that they are not responsible, in a proceeding of this character, for the truth of their publications, or for the motives with which they may be made, "save when such publications impede, embarrass or obstruct the administration of justice."

They state, under the solemnities of an oath, as a fact within their personal knowledge, that "such has been the established law of this State for over thirty years past, and that said court has no judicial power to change the same." Such a sworn statement, as to the law of contempt applicable to newspaper publications, is somewhat remarkable. If we give to the saving clause, in their answers, the interpretation which it was possibly designed to bear, the statement may be accepted not merely as a truism, but as a truism. The only ground for pronouncing any act or publication

The People v. Wilson.

a contempt of court, is, that it tends in its final results to "impede; embarrass or obstruct the administration of justice." If, on the other hand, the respondents design to say, or to be understood as saying, that they are privileged to make any publications concerning proceedings in court, however false, to assail the integrity of the court, or to endeavor to inflame popular passion concerning cases pending before it, and not be liable to attachment for contempt, unless it appears that the publication complained of really has the actual and visible effect of impeding, embarrassing or obstructing the administration of justice, in a manner susceptible of proof as an accomplished fact, if the answers are to be understood in this sense, it is to be regretted that the respondents were not better advised as to the law, before swearing what the law is.

The revised code of 1845, speaking of the Supreme Court, contains the following provision: "The said court shall have power to punish contempts offered by any person to it while sitting." This act has never been repealed or modified.

In the case of *Stuart v. People*, 3 Scam. 405, decided in 1842, a similar provision in the statute of 1829, in regard to Circuit Courts, came before this court for construction. The court, after saying that the statute might, with great propriety, be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, add the following most significant and important qualification: "In this power would necessarily be included all acts *calculated* to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court."

The respondents evidently had this case before them when their answers were drawn. They use its language, with the exception of a most material word, which changes the meaning of the entire sentence. The respondents say the rule is, that publications are a contempt only when they impede, embarrass or obstruct the administration of justice. The rule laid down by this court was, that they are a contempt when they are *calculated* to have that effect. The difference is radical, and marks precisely the difference between the guilt or innocence of the respondents in this case. They swear to a rule which would require us to say that we have actually been impeded, embarrassed or obstructed in the administration of justice, before we can hold the respondents guilty of contempt. The true test is, not whether the court has been weak or base

enough to be actually influenced by a publication, but whether it was the object and tendency of the publication to produce such an effect.

It need hardly be said that we cannot accept, as a reason for discharging the rule, the disclaimer in the answers of any intentional disrespect, or any design to embarrass the administration of justice. The meaning and intent of the respondents must be determined by a fair interpretation of the language they have used. They cannot now escape responsibility by claiming that their words did not mean what any reader must have understood them as meaning.

No candid man can deny that the article in question was well calculated to make upon the public mind the impression that the court, in a pending case, was influenced by money in its judicial action, and that it could be so influenced in other cases. Neither can it be denied that the article seeks to intimidate the court as to the judgment to be pronounced in a case then pending and involving the life and death of a human being. The article declares that the money raised for Rafferty "is operating splendidly;" predicts that he will be granted a new trial, and avers that "the sum of \$1,400 is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and that "the courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession." This language will bear but one interpretation.

I shall not stop to cite and discuss the authorities bearing on the law of contempt, as that labor has been performed by another member of the court. I merely quote the rule as laid down by Bishop, an American writer, in his work on Criminal Law, § 216. He uses the following language: "According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witness or the counsel, may be visited as a contempt."

Whether tested by this common-law definition, or by the rule laid down by this court in the case of Stuart, already cited, there is no room for doubt that the article in question must be held a contempt of flagrant character. It related to a case in court involving in its

The People v. Wilson.

final issues a human life. The answers of the respondents state that at the time of the publication "there was an intense excitement in the community, and particularly in the city of Chicago, on account of frequent murders, and the escape of the perpetrators thereof." This is no doubt true, and this article seems to have been studiously written, with a view to direct popular clamor against this court, and compel it either to affirm the judgment sending Rafferty to execution, or incur the imputation of bribery, and the clamor of an angry city to be echoed throughout the State by a portion of the Chicago press. The demand was not that we should calmly examine the record of Rafferty's trial to see whether his conviction had been legal, but that we should give him over to execution, because there was such impunity for crime in the city of Chicago that it was necessary some man should be immediately hung. We have since examined the record of this man's conviction, and reverse the judgment, all the members of the court holding that a plain provision of the statute had been violated on his trial.

Let us say here, and so plainly that our position can be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions or official conduct in regard to cases that have passed from our jurisdiction, so long as our action is correctly stated, and our official integrity is not impeached. The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government.

Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither these respondents, nor any intelligent person connected with the press, and having a just idea of its responsibilities as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending causes.

A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a

court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.

Regard it in whatever light we may, we cannot but consider the article in question *as calculated* to embarrass the administration of justice, whether it has in fact done so or not, and, therefore, as falling directly within the definition of punishable contempts, announced by this court in the case of *Stuart v. The People*. It is a contempt, because in a pending case of the gravest magnitude, it reflects upon the action of the court, impeaches its integrity, and seeks to intimidate it by the threat of popular clamor.

It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence.

So far as we are personally concerned, we should have preferred to do so. We desire no controversy with the press. But a majority of the court were of opinion that this publication could not be disregarded without infidelity to our duty. By our relations to the bar, to the suitors in our court, to the entire judiciary of the State, and to the State itself, we felt constrained to call the persons responsible for this publication to account.

It may further be said, that this article could do no permanent injury to a court strong in the consciousness of its own integrity, and in the confidence reposed in it by the people, and, therefore, the publication was unworthy of notice. It is quite true that a solitary paragraph, under ordinary circumstances, would have probably been innocuous. It is to be observed, however, that the answers of the respondents speak of the existing excitement in Chicago in regard to unpunished crime, and in that state of the public mind there was great probability that this article would win a ready credence if permitted to go unchallenged. Public meetings had been held, committees had been appointed to aid in the suppression of crime. The papers of Chicago, circulating throughout the State and the north-west, had called attention to this subject. It was made a frequent topic of discussion in the public prints, and when, finally, this article appeared in a paper of noted sobriety and respectability, containing charges and imputations against this court, which were simply infamous, the majority of the court felt that it was necessary for the good name of the State, within and

The People v. Wilson.

without its borders, and necessary in order to preserve the confidence of the people wholly unshaken, in this court, to request the attorney-general to move for a rule against these respondents. The majority of the court still think they have acted wisely. We have been controlled by no feeling of personal malignity, and do not propose to inflict a severe punishment. We wish to call the attention of the press to the limits which circumscribe their comments on judicial proceedings, and to remind them of the obligations imposed upon them by the great power which they confessedly wield. Especially do we desire to keep the judicial reputation of the State free from the appearance of dishonor, and to prevent the growth of that distrust in the minds of our own people that would certainly follow the circulation of articles like the one under consideration, if permitted to go unrebuked.

The loss of public confidence in our integrity would be a calamity little less than the loss of official integrity itself. The pomp and circumstance which in England aid to clothe the courts and the law with dignity and power, are not in consonance with our republican form of government. In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the moral influence of the courts is gone and popular respect for law impaired. Law with us is an abstraction. It is personified in the courts as its ministers, but its efficacy depends upon the moral convictions of the people. When confidence in the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence and crime.

The one element in government and society which the American people desire, above all things else, to keep free from the taint of suspicion, is the administration of justice in the courts. So long as this is kept pure, a community may undergo extreme misgovernment and still prosper. But when these tribunals have become corrupt, and public confidence in them is destroyed, the last calamity has come upon a people, and the object of its social organization has failed. The protection of life, liberty and property is the final aim of all government. This is accomplished by an honest administration of just laws. The people, by their representatives, may be relied upon to pass such laws, but unless they are honestly administered, neither life, liberty nor property enjoys the security which it is the object of government and society to

The People v. Wilson.

give. If the time shall unhappily ever come when the judiciary of this State has become hopelessly corrupt and justice is bought and sold, the loss of its moral and material well-being will as certainly follow as the night follows the day.

We are glad to say, that for more than half a century the judiciary of this State has not only enjoyed the confidence of the people, but also has received the support of the press. Never before, so far as the members of this court are aware, has the integrity of this tribunal been assailed by a public journal. The respectability of the paper in which the article in question has appeared, and the circumstances surrounding its publication, have given it a gravity which a casual article of like import would not possess. We have personally felt great reluctance to take notice of the publication, but our consciousness of the mischief that may be done in embarrassing the administration of justice, and impairing the moral authority of the judiciary throughout the State, if this article is to stand as an unpunished precedent, has compelled us to issue the rule, and now compels us to order an attachment.

It is the judgment of a majority of the court that an attachment issue against Charles L. Wilson and Andrew Shuman returnable forthwith.

WALKER, J. I am also of the opinion that a writ of attachment should issue in this case.

Mr. Justice McALLISTER concurring. At the return of the rule to show cause, the defendants did not appear in person, but caused their separate returns under oath to be filed by attorneys, who declined to appear and argue the questions raised by the returns. In this aspect of the case, it is unnecessary to consider how far the matters set forth go in excuse of the publication; because, if the defendant relied upon an excuse only they should have appeared in their own proper person. Not having done so, no mere excuse can be regarded as a cause for discharging the rule, but only as going to the question of punishment, in the event that the court finds the absence of a legal justification in the return. *The People v. Freer*, 1 Caines. 519.

The only legal justification sought to be established by the returns is the disavowal of a bad intent and matter of law arising

The People v. Wilson.

upon the face of the whole proceedings. In this behalf, their position is, that they have the legal right to do just what they have done, and this court has no power or authority, by this proceeding, to call their acts into question, inquire into their motives or the pernicious tendency of the publication. The editor of the paper states his position thus: "This respondent is advised and believes that the publication of said article had no tendency to impede, embarrass or obstruct the administration of justice in said court; that it was not so designed and had not that tendency; and this respondent does and will insist that he had, and still has, the right, as managing editor of said paper, to examine the proceedings of any and every department of the government of this State, and that he is not responsible for the truth of such publication, nor for the motives with which they were or are made, by the summary process of attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice."

This position has been deliberately taken, and it is all there is of the case. If it has been well taken, the rule should be discharged; if ill, the attachment should issue. For the purpose of analyzing the alleged justification, we will treat it as in the nature of a plea in bar. Then what are its elements? By the return, actual participation in the act of publication by the editor, and constructive by the proprietor, are admitted. Then the only fact presented is the one of intent, by a disavowal of any bad intent; for the question, whether or not the publication had a tendency, or was calculated to impede, embarrass or obstruct the administration of justice, is clearly a question of law, to be determined by the court upon inspection of the article. So also is that of the power of the court.

The return impliedly admits, that if the publication had the tendency to either impede, embarrass or obstruct the administration of justice, the power of the court to punish the defendants for a contempt exists; but it claims virtually that the exercise of the power is precluded by the disavowal of any bad intent, and defendants' denial that the article had any such pernicious tendency. If the publication had the pernicious tendency which is claimed for it on behalf of the people, it is believed that no respectable authority can be found to the effect that a disavowal of a bad intent amounts to a justification. It would be contrary to the rule of law that every man must be presumed to intend the natural and necessary consequences of his own deliberate acts. In the case of *The People v.*

Freer, above cited, which was a proceeding like this, the point was expressly adjudicated by the Supreme Court of New York, KENT, J., delivering the opinion of the court. "We cannot but perceive," said that great judge, "that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications reflecting on judicial proceedings which are before us."

I have said that the construction and tendency of the article in question were a matter of law for the court. Of the truth of this proposition there can be no doubt. But the court is bound to give it a fair and reasonable construction, according to the natural and common import of the language employed; and when so construed, the question whether its publication constituted a contempt which the court is authorized to punish by attachment, must be determined by the character of the publication and the circumstances under which it was made.

As to the circumstances, it will suffice to say, that, at the time of the publication, the case of Rafferty, referred to in the article, was pending before us for decision. This fact was well known to the defendants, and especially to the editor, as appears by both his return and the article itself. It is of that cause and its pendency here, that the article speaks; and the ordinary and natural meaning of the language used conveys, in the most direct and unequivocal manner, the charge of corruption, on the part of this court, in respect to that very case; and was calculated and intended to portray the character and position of the court as being so degraded as to be under the control of the most unprincipled and despicable class of society. The first paragraph, relating to the delay of the court in deciding the case, evidently refers to its action at the time of allowing the *supersedeas*, in requiring Rafferty's counsel to submit the cause, in order that it might be passed upon at this term. Then it proceeds: "The riff-raff who contributed fourteen hundred dollars to demonstrate that 'hanging is played out,' may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out, and this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the *sum of fourteen hundred dol-*

The People v. Wilson.

lars is enough nowadays to purchase immunity from the consequences of any crime." Then, that there might be no misunderstanding as to what is meant by this tissue of scandal, there come these significant words : " The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men." This expression would be understood, and was intended, to refer to this court, which was the only one previously alluded to ; and what more degrading and scandalizing charge could be couched in language ? It is well understood by the public that this court is the only one in the State which has the power to license and strike the names of attorneys from the rolls. If the court is under the complete control of the vile class designated, the degradation must be voluntary on the part of the court, yet it is here proclaimed to the public that a court which possesses the power to rid itself of the shysters and jackals of the legal profession, is nevertheless completely under their control. After this charge is followed what may well be called a threat. " All this must be remedied ; there can be found a remedy, and it *must* be found."

The tendency of the article is to degrade and scandalize the court, to overawe its deliberations and extort a decision against the accused. That such was the intent and purpose, scarcely admits of a doubt. In this attempt to extort a decision of affirmance rests the great criminality of the article, rather than the reflections upon the court. Publications scandalizing the court, and intended to unduly influence and overawe its deliberations in causes pending, are contempts which this court is authorized to punish by attachment, and it is essential to the dignity of character, the utility and independence of the court, that it should possess and exercise such authority. Here the corruption is imputed, and the effect predicted in such a manner as to prepare the public mind to believe the charge, if the decision turns out to be as predicted. Any well-constituted judge would receive the threats of a mob gathered about the court-house for the purpose of overawing his deliberations upon a particular case, with far greater coolness and equanimity than such a threatened blot upon his character. Whatever may be the character of Rafferty, however humble and lowly in life, or however bad a man he may be, he is nevertheless clothed with the same constitutional rights which belong to the highest and best citizens in the State. He can be deprived of his life only by due process of law. He has

the same right to invoke the safeguards devised for the protection of innocence and to secure a fair and impartial trial, as though he were in fact innocent, and as any other citizen might do; because the law is, and in the nature of things must be, general in its application. The establishment of these rights by our beneficent constitution has cost too much suffering and blood, though in the distant past, to be readily relinquished by an intelligent people; and it seems an extraordinary spectacle to witness such an attack upon the character of this court, acting under the sanction of an oath of office, for exhibiting in its judicial action a proper respect for principles heretofore esteemed so sacred and so indispensable to the proper protection to life and liberty, and I cannot refrain from remarking in this connection, that if this publication was made for the purpose of destroying those safeguards, as a necessity for the suppression of the crime of murder in Chicago, as is avowed in the return, such a purpose ought to enhance instead of mitigating the criminality of the publication. It would take a long time, in my judgment, to inspire those criminally disposed, those born and reared in the haunts of vice, neglected by parents and society, without moral development, with a feeling of just respect for the sanctity of human life, by giving them examples, frequent examples, of the summary and reckless violation of that sanctity, by the public authorities, under forms of law divested of all the consecrated principles for the protection of innocence, by trials which could not be otherwise than grim mockeries of justice, controlled, swayed, and their results dictated by the passion and popular clamor of the hour. While I may truly say, that I have no feelings of resentment for the unwarranted attack upon the court, of which I am a member, yet for this assault upon institutions which I have been educated to revere, I have feelings of deprecation and sorrow; and it is to be believed that a little careful observation and sober reflection will lead both the people and the press of Chicago to the conclusion, that the fault lies not in the law nor yet in the courts. It seldom happens that a good and careful lawyer, who has a good cause and wins it, has any trouble with errors in his record.

It is an unpleasant duty, but I feel constrained by the deepest convictions of conscience, by a lively regard for the credit of the State and her institutions, for the administration of justice, to concur in the opinion, that the rule should be made absolute and that an attachment should issue.

The People v. Wilson.

Mr. Justice THORNTON, also concurring. A return has been made to the rule issued in this case, in which the respondents acknowledge the publication of the article, in *The Chicago Evening Journal*, and insist upon the right, through their paper, to examine the proceedings of every department of the government of the State, and that they are not responsible for such publications, nor answerable to the summary process of attachment for contempt, unless the publications impede, embarrass, or obstruct the administration of justice. It is also urged the publication had no such tendency.

The cause pending in the court, when the obnoxious publication was made, was *Rafferty v. The People*. Rafferty had been found guilty of murder, in the court below, and sentenced to be hanged. As was his right, according to the constitution and laws of the land, he demanded of this court a calm and dispassionate examination of the facts and questions presented in the record, and insisted that the law had been violated in his trial and conviction.

The life of a fellow man awaited our decision. The result, to him, was fearful; grave responsibility rested upon the court and the counsel, and solemn deliberation was required.

Under such circumstances, the publication was made, and while the court was in session. It refers to the court, and the case pending in it; intimates that the court had blandly assured the public that there should be a speedy examination; asserts that time had sped away, and no information had been given that any thing definite had been done; that the prisoner's counsel was studying the policy of delay, with success; that the sum of \$1,400, contributed to demonstrate that "hanging is played out," is operating splendidly; that the prisoner will be granted a new trial, and finally pardoned, in spite of the virtuous indignation of the public, "because the sum of \$1,400 is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and then charges that "the courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood, spilled by the hands of other men." The slight allusion to the action of the legislature cannot relieve the gross attack upon the court and its officers. The case referred to in the publication has been reversed by a unanimous court, for manifest error in denying the accused a change of

venue, and thus, it may be, depriving him of an impartial trial, vouchsafed to him by the constitution and the laws.

Was the publication a contempt of court? Or can there be none, except for disobedience of its orders or process, or disorderly or contemptuous behavior in its presence?

The law, as it is written, must answer. In 2 Hawkins, 220, contempts are classified as contempts in the face of the court, and contemptuous words or writings concerning the court. Again, they are termed ordinary or extraordinary. The latter consists of abusive and scandalous words respecting the court. Bouvier's Inst. vol. 4, 385. According to Blackstone, book 4, 285, they may be committed either in the face of the court, or "by speaking or writing contemptuously of the court or judges acting in their judicial capacity."

This court has defined them to be, direct, such as are offered in the presence of the court, while sitting judicially, or constructive, such, though not in its presence, as tend by their operation to obstruct and embarrass or prevent the due administration of justice. *Stuart v. The People*, 3 Scam. 395.

Bishop thus defines constructive contempts: "According to the general doctrine, any publication, whether by parties or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or reflects on the tribunal of its proceeding, or on the parties, the jurors or the counsel, may be visited as a contempt." Vol. 2, § 26.

In this State the constitution has established the judiciary, and made it a co-ordinate department of the State government. A necessary incident to its establishment is the power to punish for contempts.

This court held, in an early case, that the power to punish for contempts was an incident to all courts of justice, independent of statutory provisions. *Clark v. The People*, Breese, 340. Courts in other States have also announced the doctrine that this power is inherent in all courts of justice — necessary for self-protection, and an essential auxiliary to the pure administration of the law. *United States v. New Bedford Bridge*, 1 Woodb. & Min. 470; *State v. Johnson*, 1 Brev. 155; *Yates v. Lansing*, 9 Johns. 416; *Cassart v. The State*, 4 Ark. 541; *Neil v. The State*, 4 Eng. (Ark.) 263; *United States v. Hudson*, 7 Cranch, 32. The statute likewise approves

The People v. Wilson.

the exercise of the power, when it provides that the Supreme Court "shall have power to punish contempts offered by any person to it while sitting." This provision was in force July 1, 1829, and was the law when the decision in the case of *Stuart v. The People, supra*, was rendered. The court then declared that the statute "affirms a principle inherent in a court of justice, to defend itself when attacked, as the individual man has a right to do for his own preservation." The statute merely affirms a pre-existent power, and does not attempt to restrict its exercise to contempts in the presence of the court; but leaves them to be determined by the principles of the common law.

Without the power courts could not fulfill their responsible duties for the good of the public. They would lose all self-respect, and would not perform the duty they owe to the State, if they failed to struggle for their independence and defend their life.

No one doubts either the right or duty of a court to punish as contempts, rude and contumelious behavior, breaches of the peace, or any willful disturbance in its presence.

Whence the necessity for the exercise of the power? It is that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the safety of the parties, or the judge or officers of the court, that the court may have that regard and respect so essential to make the law itself respected, and that the streams of justice may be kept clear and pure.

If the court is scandalized and its integrity impeached, while a cause is pending before it, if the counsel are grossly libeled, and low and obscene terms are applied to them, which may have the effect to intimidate, the consequences must be the same as if direct contempts are offered. The administration of the law is embarrassed and impeded, the passions, often unconsciously, are roused, the rights of parties are endangered, and a calm and dispassionate discussion and investigation of causes are prevented.

The authority to punish for constructive contempts has been recognized by numerous courts, in England and America. I shall merely cite a few of these cases. *Respublica v. Passmore*, 3 Yea. 441; *Oswald's Case*, 1 Dal. 319; *People v. Freer*, 1 Caines, 515; *Tenney's Case*, 3 Fost. (N. H.) 162; *Hollingsworth v. Duane*, Wall. (1. O. U. S. 77; *United States v. Duane*, id. 102.

In *Tenney's Case*, the respondent was interested in a suit brought by his son against one of the defendants in a bill of equity, in

which suit the son was unsuccessful, but he was not a party to and had no interest in the suit in equity, and while the bill was pending he caused copies thereof to be printed and circulated extensively. The bill contained serious charges, and the respondent also said that he could stop the proceedings in equity if one thousand dollars were paid to him.

The conduct and language were out of the presence of the court, and it was held to be a contempt, and calculated to disturb the free course of justice. In conclusion, the court said:

"The circulation of such charges, in the absence of proof, by a person unconnected with the questions to be tried, was dishonorable and vindictive in the highest degree, and an unwarrantable interference with the administration of justice."

In *Respublica v. Passmore, supra*, the defendant affixed a writing to a board in the exchange room in the city tavern, reflecting upon the parties to the suit, and the court held that the publication of such a paper prejudiced the public mind in a cause depending in court, and was a contempt.

In *Oswald's Case*, the publication in a newspaper, of wanton aspersions upon the character of the opposite party, was ruled to be a contempt, and Chief Justice McKEAN said, that without the power to punish for contempts no court could possibly exist.— "Nay, that no contempt could, indeed, be committed against us, we should be *so truly contemptible*."

In the case of *The People v. Freer, supra*, a publication was made in a newspaper in regard to a cause under investigation, and was intended to prejudice the public mind against the court, and to intimidate it in its decision on the motion for a new trial in the case of *The People v. Croswell*. KENT, J., afterward Chancellor, delivered the opinion of the court, and said that publications scandalizing the courts, or intending, unduly, to influence or overawe their deliberations, were contempts, which should be punished by attachment; and that it was essential to their dignity of character, their utility and independence, that they should possess and exercise such authority.

In *United States v. Duane*, there was a publication in a newspaper, pending the cause, reflecting upon the court and jury. The court held that it was a contempt, which had a tendency to deter counsel and intimidate the court, if they were susceptible of intimidation.

In *The State v. Morrill*, 16 Ark. 384, a publication was made in a newspaper, while the court was in session, which, in the language of the court, seemed "to intimate, by implication, that the court was induced by bribery to make the decision referred to." It was regarded as a contempt, and an imputation upon the purity of the motives of the members of the court while acting officially in a particular case.

In determining the sufficiency of a plea to the jurisdiction of the court, Chief Justice ENGLISH delivered an able opinion, and held that the right to punish for contempts was inherent in all courts of justice—a part of their life and a necessary incident to the exercise of judicial powers—that the section in the Bill of Rights, that "every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*," gave the right to any citizen to publish the proceedings and decisions of courts, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges, and the fidelity with which they perform their public trusts; but not by defamatory publications, to degrade the tribunal, destroy public confidence in it, and thus dispose the community to set at naught its judgments and decrees.

In the class of constructive contempts, this court has said, "would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done *in the presence of the court*." *Stuart v. The People, supra*.

The power is arbitrary, and should be exercised with prudence and moderation, and only in extreme cases. Indeed, all power is arbitrary; but this furnishes no reason why the silent power of a court should not be awakened to restrain wrong, and to check the attempt to destroy all respect for the law by calumny of its officers, who are the channels by which justice is conveyed to the people.

What is the nature and character of the publication, and what is its tendency and effect?

This court is charged, impliedly, if not directly, with bribery. If such was not the intent, words are useless to convey an intent. This court, and the cause pending therein, are mentioned, and a new trial predicted, not because the law demands it, but because immunity from crime can be purchased.

It is said that the money had been contributed. This court, at

The People v. Wilson.

It is scandalous, abusive, passionate, in tone and spirit. It impugns the integrity of this court, and classes the counsel of the accused amongst the most degraded of the profession. Its false charges of crime are calculated to disturb the mind of the pure man, and unfit him for the discharge of arduous and responsible duties. Abuse can never convince. Passion must rouse passion.

The tendency must be to impair the usefulness of this court, deprive it of respect, obstruct it in the due administration of the law, and if silently submitted to, so debase it as to present it a spectacle, beneath even contempt.

I concur in the issuance of the attachment.

SCOTT, SHELDON and BRESEE, JJ., dissented:

The writ of attachment awarded by the court, was issued on the 6th day of November, 1872, in the following form:

"STATE OF ILLINOIS. } _____	IN THE SUPREME COURT, Northern Grand Division, September Term, A. D. 1872.
--------------------------------	--

"The People of the State of Illinois to the Sheriff of La Salle County—*Greeting*:

"Whereas, It has been made to appear that Charles L. Wilson and Andrew Shuman have printed and published an article, which has been adjudged by the said court, now in session in Ottawa, in the aforesaid county and State, to have been printed and published in contempt of said court while so in session, as aforesaid.

"We, therefore, command you, that you attach the said Charles L. Wilson and Andrew Shuman, so as to have their bodies forthwith before our said Supreme Court, at Ottawa, in the county aforesaid, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further, to do and receive what our said court shall in that behalf consider. Hereof fail not, and have you then and there this writ.

"Witness, CHARLES B. LAWRENCE, Chief Justice of said court, and the seal thereof, at Ottawa, this sixth day of November, in the year of our Lord one thousand eight hundred and seventy-two.

"W. M. TAYLOR,
 "Clerk of the Supreme Court."

The People v. Wilson.

On the 8th day of November the respondents appeared in court, in answer to the writ of attachment, whereupon the chief justice pronounced the following sentence:

"You, Charles L. Wilson and Andrew Shuman, are before this court under an attachment for contempt, in consequence of an article relating to a cause pending in this court, and published in a newspaper of which you, Charles L. Wilson, are the proprietor, and you, Andrew Shuman, are the chief editor.

In the opinion delivered by the majority of this court, when passing upon your return to the rule to show cause why an attachment should not issue against you, we have said all that we desire to say in regard to the character of the publication, and the injury which such publications tend to cause to the administration of justice. It was then held that your answer showed no reason why an attachment should not issue. It now only remains to impose upon you a penalty for the offense. It is in the power of the court, in cases of this character, to punish by both fine and imprisonment. We have, however, no desire to inflict a severe penalty. Our object will be accomplished if we show to the press that it cannot be permitted to attempt to influence the decision of cases pending in the courts. We are not unmindful of the fact that neither of you wrote the objectionable article, and that you, Charles L. Wilson, did not see it before its publication. We shall impose upon you only a moderate fine, as we cannot believe you are likely to commit similar offenses in the future.

"You, Charles L. Wilson, are adjudged to pay a fine of \$100, and you, Andrew Shuman, are adjudged to pay a fine of \$200, to the treasurer of this State. You are also adjudged to pay the costs of this proceeding. The fine will be paid to the clerk of this court, who is directed to remit the same immediately to the State treasurer, and procure his receipt therefor, to be filed among the papers in this case.

"The sheriff will hold respondents in his custody until the fine and costs are paid to the clerk."

Langabier v. The Fairbury, Pontiac and North-western Railroad Co.

LANGABIER V. THE FAIRBURY, PONTIAC AND NORTH-WESTERN
RAILROAD COMPANY.

(84 ILL. 242.)

Sunday — injunction granted on.

A court of equity may lawfully issue an injunction on Sunday where necessary to prevent an irreparable injury to property. (*See note, p. 554.*)

BILL in chancery for a writ of injunction. The opinion states the case.

A. E. Harding and J. B. Young, for plaintiff in error.

Pillsbury & Lawrence and L. E. Payson, for defendant in error.

BREESE, J. This was a bill of chancery, in the Livingston Circuit Court, praying for a writ of injunction to restrain the Fairbury, Pontiac and North-western Railway Company from taking possession of one of the principal streets (Walnut) in the incorporated town of Fairbury, for the purpose of grading, tying and ironing the same for the track of their railroad.

The bill is filed by a large property owner on the street to be taken by the railway, and it alleges that the company, immediately after 12 o'clock of the night of Saturday, with a large force of men, had taken violent possession of the street for the express and avowed purpose of finishing their track through its entire length before the next Monday morning; and that they had selected Sunday for the work, for the express purpose of evading an injunction, and avoiding the process of court, and for the purpose of obtaining and holding the street without paying for it or the damages thereby occasioned to the property owners upon it; that the company has not paid or offered to pay any thing to any person injured by the proposed occupancy of that street, nor taken any steps or measures to estimate the damages or have the same assessed in pursuance of law.

It is also alleged that the company is wholly insolvent, and if it is permitted to take possession, control and use that street, for the purpose of operating their trains over the same, without paying complainant the damages he will sustain in consequence thereof, he

Langabier v. The Fairbury, Pontiac and North-western Railroad Co.

will be without remedy in the premises, and will absolutely lose at least one-half the value of his property in consequence thereof, and that the grading for railway purposes will greatly injure the street and complainant's property; and unless the company, the contractors and their agents and servants are restrained by injunction issued forthwith, the road will be finished through the street to-day, Sunday; and that the company and its contractors are doing the work on this day—Sunday—in order to avoid paying complainant his damages, and to defraud him out of the same, which they will accomplish successfully unless immediately enjoined by process of the court.

This bill was presented to the master in chancery, in the absence of the circuit judge, on Sunday. The writ of injunction was ordered by the master on that day, and issued by the clerk and served by the sheriff on the same day.

At the September term following, a motion was made to quash the writ, which was allowed, and the bill dismissed.

Complainant brings the record here by writ of error, and assigns this action of the court as error.

The bill, on its face, presents strong grounds for the interference of a court of chancery, and justified the ordering and issuing a writ of injunction. But the defendant insists, if this be so, no valid writ could issue on Sunday. He insists that the order of the master in chancery, being made on Sunday, was void, for the reason it was a judicial act, and Sunday is not a judicial day.

As a general proposition, it may be conceded Sunday is not a day in law for proceedings, contracts, etc. 2 Inst. 264.

Anciently, however, courts of justice did sit on Sunday. The early Christians of the sixth century, and before, used all days alike for hearing of causes, not sparing the Sunday itself; but in the year 517 a canon was promulgated exempting Sundays. Other canons were adopted in subsequent years exempting other days, which were all revised and adopted by the Saxon kings, and all confirmed by William the Conqueror and Henry the Second, and in that way became a part of the common law of England. *Swann v. Broome*, 3 Bur. 1595.

By the canons of the church, Sunday was decreed *dies non juridicus*, and by the same canons other days were declared unjuridical, as the day of the Purification of the Blessed Virgin Mary, the Feast of the Ascension, the Feast of St. John the Baptist, and All Saints

Langabier v. The Fairbury, Pontiac and North-western Railroad Co.

and All Souls Days. These were as much unjuridical days as Sunday, yet the most devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice in this State on either of those days would be valid. Yet, by the common law, no valid judicial act could be performed on either of those days. Why, then, if such an act can be done, and have binding force, on those unjuridical days in this State, should not equal efficacy be accorded to the same act, if done on the other unjuridical day, viz.: Sunday?

It is answered, that secular employment of any kind is prohibited by our criminal code, and reference is made to section 144.

We had occasion, in *Johnson v. The People*, 31 Ill. 469, to express, briefly, our views of this question, the case being one where a recognizance had been taken by a magistrate on Sunday, from which the cognizor sought to be discharged, on the ground that, having been taken on Sunday, and being a judicial act, it was void and of no effect. This court said, generally judicial acts cannot be performed on Sunday, but the recognizance was held to be valid, and no violation of the section referred to; that we were to understand by the word "necessity," not a physical and absolute necessity, but the moral fitness and propriety of the work done under the circumstances of each particular case — that any work, therefore, necessary to be done to secure the public safety by the safe-keeping of a felon, or delivering him to bail, must come within the true meaning of the exception in the statute; that neither the peace nor good order of society was disturbed by such a proceeding, as it may be, and usually is, silently conducted.

The notion that Sunday is a day so sacred that no judicial act can be performed, had its origin with ecclesiastics of an unenlightened age, and rests upon no substantial basis, and if it is the doctrine of the common law, it need not have application here, in this day of thought and increased enlightenment. Men are freer now than then, and are permitted to regard acts as innocent and harmless, which were then deemed sacrilegious and worthy of anathema. So long as our own statute is not violated — so long as nothing is done which it forbids, there can be no reasonable ground for complaint.

There is nothing in our constitution of government inhibiting the general assembly from declaring Sunday to be *dies juridicus*. One step has been taken in that direction by providing by law as

Langabier v. The Fairbury, Pontiac and North-western Railroad Co.

follows: On proof being made before any judge or justice of the peace or clerk of the Circuit Court within this State, that a debtor is actually absconding, or concealed, or stands in defiance of an officer duly authorized to arrest him on civil process, or has departed this State with the intention of having his effects and personal estate removed out of the State, or intends to depart with such intention, it shall be lawful for the clerk to issue, and the sheriff or other officer to serve an attachment against such debtor on a Sunday, as on any other day, as is directed in this chapter. R. S. 1845, ch. 9, § 27.

Here, this *dies non juridicus* was selected by the railway company as the proper day to commit a great outrage upon private and public rights, believing the arm of the law could not be extended on that day to arrest them in their high-handed and unlawful design. To the complainant the acts they were organized to perpetrate on that day were fraught with irreparable injury. Feeble indeed would be the judicial arm if it could not reach such miscreants.

To save a debt of \$20, judicial acts can be performed on Sunday, and maintained as well. To prevent the ruin of an individual, such an act must not be done. "Lame and impotent conclusion."

In Comyn's Digest, title "Temps," under the head *Dies non juridicus*, it is said, the chancery is always open. So the Exchequer may sit upon a Sunday or out of term. P. 333 (C. 5). There is nothing, to an intelligent mind, revolting in this.

Suppose, in times of high political excitement, a citizen is indicted for treason, and judgment of death is pronounced against him by a servile judge, who, not a slave of the Crown, as were Tressillian, Scroggs and Jefferies, but yet a slave of an enraged populace, on an indictment never returned into court, or found by a grand jury, and defective in every essential, and this judgment pronounced on Saturday, and the time of his execution fixed on the following Monday. To arrest this proposed judicial murder, an application is made to a member of the Appellate Court on the intervening Sabbath, who would justify the judge, should he fold his arms and, on the plea the day was not a judicial day, suffer the victim to be led to execution?

The necessity of the case would be the law of the case. The judge who has no respect for this principle is unworthy the ermine and an unfit conservator of the rights of the citizen.

The case before us is not one of life or death, but it involves
VOL. XVI.—70

Bissell v. The City of Kankakee.

irreparable injury to property. An imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of right, of reason, of common justice and common sense.

The decree of the court below quashing the writ of injunction and dismissing the bill is reversed, and the cause remanded for further proceedings.

Decree reversed.

NOTE.—See cases cited in Broom's Legal Maxims, 21; see also *Van Vechten v. Paddock*, 12 Johns. 178, wherein THOMPSON, Ch. J., considers the history of the maxim *Dies dominicus non est juridicus*.—RMR.

BISSELL V. THE CITY OF KANKAKEE.

(64 Ill. 248.)

Municipal corporations—power to issue bonds—unauthorized bonds void—demurrer.

A municipal corporation, without express authority for so doing, issued bonds, simply for the purpose of making a donation. The appellants became the innocent purchasers of the bonds without any notice of the want of authority on the part of the corporation to issue them. *Held*, that the acts of the corporation were *ultra vires*, and hence the bonds so issued were absolutely void even in the hands of an innocent holder.

ACTION on several bonds. The opinion states the case.

John Woodbridge, for appellants.

William Potter, for appellee.

SCOTT, J. The declaration is in debt, and counts on ten bonds, each for the sum of five hundred dollars, issued by the city of Kankakee to "The Douglas Linen Company," and by that company indorsed and delivered to the appellants.

The appellee filed two pleas; first, *nil debet*, and second, *non est factum*, upon which issue is joined.

Bissell v. The City of Kankakee.

The special pleas in bar of the action are in substance the same. The principal averments are, that the several causes of action in the several counts of the declaration are for one and the same thing, viz.: For the bonds or writings obligatory therein declared on, and for no other cause; that the city of Kankakee was a municipal corporation organized under and by virtue of an act of the legislature; that it is a corporation of limited powers; that the several bonds were executed by the city by its officers without authority of law and in violation of the authority conferred upon it by the act of the legislature; that the bonds were executed and delivered to "The Douglas Linen Company," and were given as a donation to that company to enable it to engage in the manufacture of linen thread and linen fabrics; that no consideration was given by the company to the city for the bonds so issued, or any or either of them, and hence that the bonds were and are wholly void.

A demurrer was interposed to the several special pleas setting up this defense, and was by the court overruled and final judgment entered, and that decision is the principal error assigned.

It is not pretended that the city had any special authority under any act of the legislature to issue the bonds which are the subject of this action.

The right to recover is based on the ground that a municipal corporation has a general power incident to all such corporations, as held by this court in *The City of Galena v. Corwith*, 48 Ill. 423, to issue bonds for any indebtedness; and on the further ground that the appellants, who were alleged to be the innocent holders of these bonds, had no notice of the want of authority on the part of the city to issue them.

We do not think either ground assumed can be maintained.

The bonds were not issued by the city in liquidation of any previous indebtedness, as were the bonds in *Corwith's* case, *supra*, and hence, that case and the others cited can have no application.

This was not a borrowing of money for municipal purposes, or the payment of any indebtedness, but simply a donation to "The Douglas Linen Company," to enable it to embark in the manufacture of linen fabrics in that city. The legislature had never conferred upon that city any power to make donations for such purposes. It was held, in *Trustees, etc., v. McConnel*, 12 Ill. 138, that a municipal corporation, being a mere creature of the law, can only exercise such powers as are conferred upon it by the act creating it.

Bissell v. The City of Kankakee.

Manifestly, therefore, the acts of the officers of the city of Kankakee in issuing the bonds for the purpose of making a mere donation to "The Douglas Linen Company," were *ultra vires*. No warrant for their action can be found in their city charter, or in any act of the legislature.

This is not a case where there has been an irregular or defective execution of a power in issuing bonds by a corporation having lawful authority to do so, but here there is a total want of authority, and hence the bonds are absolutely void. *Marshall Co. v. Cook*, 38 Ill. 44; *Schuyler Co. v. The People*, 25 id. 181; *Supervisors, etc. v. Clark*, 27 id. 305.

It is urged that where a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under circumstances which gave the requisite authority; and because the holders in this instance had no notice of the want of authority, the bonds cannot be impeached in their hands, and the case of *Gelpcke v. The City of Dubuque*, 1 Wall. 203, is relied on as authority.

Whatever presumptions may be indulged with regard to private corporations, created by acts of the legislature to facilitate the transaction of commercial and other business of a private character, it has been held in *Marshall Co. v. Cook*, *supra*, that no such presumptions prevail in regard to municipal corporations.

In the case of *Marsh v. Fulton County*, 10 Wall. 676, it has been decided by the Supreme Court of the United States that bonds issued by a county in aid of the construction of a railroad without legal authority were absolutely void. The same point was made in that case as in the case at bar, that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity, and it was held that the authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder; and no such authority appearing, the bonds were declared void in the hands of the plaintiff, who was in fact a purchaser without notice of the want of power in the county to issue them.

The authority of a municipal corporation to issue bonds is derived from public laws, and the avenues to information in regard to the law and ordinance of such corporations being open to public inspection, the holder of such securities will be presumed to have examined them, and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in

Commercial Insurance Company v. Robinson.

regard to private corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken.

The holder of the bonds involved in this action had every opportunity to know whether the city had any lawful right to issue them, for the reason that its authority, if any existed, was to be found in public statutes, and if they did not in fact examine, as was their privilege to do before buying, they will be presumed to have done so, and to have known that they were issued without authority of law, and therefore void in the hands of any holder, either with or without notice.

The plea presented a full and complete defense to the bonds in the hands of the appellants, and the demurrer was properly overruled.

Upon the whole record, we are of opinion that the judgment should be affirmed.

Judgment affirmed.

COMMERCIAL INSURANCE COMPANY, appellant, v. ROBINSON.

(24 Ill. 285.)

Insurance policy — construction of — fire caused by explosion.

A policy of insurance provided that the company should not be held liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power, nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." *Held*, that the company was not exempted, by such clause, from liability for losses by fire caused by explosion, but simply from liability for losses occasioned by the explosion itself.*

ACTION on policy of insurance. The facts appear in the opinion.

O. B. Sansum and Dent & Black, for appellant.

E. & A. Van Buren, for appellee.

* See *United Ins. Co. v. Foot* (22 Ohio St. 340), 10 Am. Rep. 736, wherein the policy excepted from the risk loss "resulting from any explosion," and the company was held not liable where the fire was caused by an explosion. But see *Boatman's Ins. Co. v. Parker* (23 Ohio St. 85), 13 Am. Rep. 228. — RMR.

Commercial Insurance Company v. Robinson.

LAWRENCE, C. J. The policy in this case provided that the company should not be liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion or military or usurped power; * * * nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind."

The main question is as to the construction to be given to this last clause. It is contended by counsel for the company that it protects the company from liability for any loss by fire where the fire has been produced by an explosion. It is insisted on the other hand, by counsel for appellee, that the clause protects the company only against losses occasioned directly by an explosion, and not against losses from fire where the fire has been caused by an explosion.

Counsel for appellant, in support of their position, cite *St. John v. Am. Mut. Ins. Co.*, 1 Kern. 516; *Haynard v. Liverpool and London Ins. Co.*, 7 Bosw. 385, and *Stanley v. West. Ins. Co.*, 3 Exch. 71.

In the case in 1 Kern. the Court of Appeals was divided. We have read the opinions of the majority and minority of the court, and consider the reasoning of the latter the more satisfactory. Even the majority of the court did not agree upon the grounds for affirming the judgment of the lower court. As pointed out in the dissenting opinion, the judgment was affirmed not merely upon different, but adverse reasons. The case is, therefore, worth little as authority. The case in 7 Bosw. is not correctly stated by counsel for appellant. In that case there were two clauses in the policy. Counsel gave but one. The other was explicit and, in terms, excluded liability for losses by fire arising from an explosion. The English case cited is in point for appellant.

If this were a question as to an alleged rule or principle of the common law, with these authorities cited on the one side, and none upon the other, we might repose securely upon them, and hold them decisive of the case before us. But it is simply a question as to the interpretation of a few words in a written instrument which are susceptible of two different interpretations. We are to determine which is the more reasonable construction, and if our judgment is satisfied on this point, we must accept its conclusions, though differing from those of the courts to which reference has been made.

Let us remark, in the first place, that equivocal expressions in a

Commercial Insurance Company v. Robinson.

policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company. *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106. The companies have the preparation of their own policies, the choice of language in which to express their obligations, and they show a studious solicitude to limit their liability. Their policies are prolix with provisions of this character, and the public must accept them or go without insurance. We have no right to censure the companies for this, and do not, but the reading of a policy furnishes a sufficient reason for the rule of interpretation formerly laid down by this court.

It will be observed that, in a clause of the policy preceding the one under consideration, the company stipulated that it should not be liable "for any loss or damage *by fire* caused by means of an invasion, insurrection," etc. Here exemption is specially secured against liability for losses *by fire* caused in a certain manner. But the clause under consideration leaves out the words "by fire." It secures exemption from liability for losses caused by explosion, but not from liability for losses *by fire* caused by explosion. The difference in phraseology between the two clauses is so marked, that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended.

Whether the difference was intended or not, cannot be certainly ascertained, but it is reasonable to resolve the doubt against the company. The object of the company's existence is to insure against fire. That is what it holds itself out to the public as able and willing to do. When a person takes out a policy, and pays his premium, he takes it for granted, without reading his policy, that he cannot be permitted to make the risk more hazardous to the company by storing highly inflammable materials upon his premises. He knows that would be acting in bad faith with the company, and that the policy has probably provided against it. But he would have no reason to suppose that, among the voluminous stipulations of the policy, there would be found one intended to deprive him of its benefit, because a fire, which has destroyed his property, originated in another house a half mile distant, in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company would make the assured assume the liability for

the carelessness of others. He is thus deprived of the very protection he seeks by his insurance if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire of Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property then destroyed.

Counsel for the company, feeling the unreasonable character of this condition, with their interpretation, in cases where the fire comes from an explosion on other premises, speak of it as if it referred only to explosions on the premises of the assured. But the policy will bear no such construction or limitation. We must either hold that the clause refers to loss by explosions simply, without reference to fire, or to losses by fire caused by explosion anywhere, whether on or remote from the premises. There is no middle term. It must receive one of these constructions or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and, in a large degree, would make fire insurance a mere mockery. We cannot hesitate which construction to choose.

But, say the counsel for appellant, this company does not profess to insure against losses by explosion, but only by fire, and the clause, construed as we construe it, is unmeaning, or at least useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss. Suppose fire is carelessly applied to powder or other explosive substance. An explosion follows which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss caused by fire. The courts might not so hold, independently of the clause in the policy, but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a case where a fire is speedily subdued, but before it is, it has ignited powder, and an explosion has taken place which has caused much damage but has not extended the fire. In such a case, the company

Ward v. Brown.

would claim they were protected by this clause from the liability for the consequences of the explosion.

It is not necessary, however, for us to show how the clause was designed to operate. It is sufficient to say that, in our judgment, it cannot receive the construction claimed by the company.

It is urged that the stipulations of the policy were not complied with in regard to an appraisement. An inventory of the goods burned or injured was furnished to the company. They expressed their dissatisfaction with it, and might have insisted on the appointment of appraisers. They made no offer to have them appointed, and it was not incumbent on the appellee to move further in the matter. He did what the policy required him to do when he furnished the inventory.

The judgment of the court below is affirmed.

Judgment affirmed.

WARD, appellant, v. BROWN.

(64 Ill. 307.)

Trespass — when maintainable.

Agreed to pasture A's cattle in his field; and afterward, without A's knowledge, agreed with C that the cattle should run also in C's field, which adjoined that of B. The cattle escaped through C's defective fence into the close of D adjoining, and did damage there. *Held*, that A was not liable to D in trespass.

TRESPASS to recover damages alleged to have been occasioned by defendant's cattle. The opinion states the case.

E. F. Bull, for appellants.

Eldridge and Lewis, for appellee.

WALKER, J. This was an action of trespass, brought by appellee, before a justice of the peace, against appellants, to recover damages claimed to have been sustained by the trespass of appellants' cattle upon appellee's premises. A trial before the justice of the peace

resulted in a judgment in favor of plaintiffs for \$24 and costs. The case was removed by appeal to the Circuit Court of La Salle county, where a trial was again had by the court, by consent of the parties, without a jury, which resulted in a like judgment as that rendered by the justice, and the case is appealed to this court.

It appears from the record in the case that appellants agreed with one Conners to pasture their cattle, for a specified price per week, in the cornstalk fields of Conners. Afterward, Conners made an arrangement with one Burns, without the knowledge of appellants, by which the cattle were placed in Burns' field, which adjoined Conners', and they were to divide the pay, according to an agreement between them. The cattle were first put into Conners' field, but the fence was taken down between Conners' and Burns' fields by them, and the cattle were permitted to run in both fields. The cattle broke through from the field of Burns to that of appellee, and committed the trespass for which the action was brought. It also appears that the portion of the division fence between appellee and Burns, which the latter was bound to maintain, was insufficient to turn stock, and the cattle passed through that portion of the fence. The trespasses were committed before appellants knew that the cattle had been turned into Burns' field. There were also 10 or 15 head of Conners' cattle running with those of appellants.

Are appellants liable, under the circumstances of the case, to respond in damages? We think not. In Hilliard on Torts, vol. 1, p. 565, it is said: "If a servant or stranger, without the concurrence of the owner, chase or put his cattle into another's land, such owner is not liable, but the action must be brought against the servant or stranger;" and it is said in Bacon's Abridgment, title Trespass, G 2, p. 594, "if a servant, without the knowledge of his master, put his master's beasts into the close of J S, this action does not lie against the master." In this case we can see no act done by appellants which either directly or indirectly contributed to the injury. They hired Conners to pasture the cattle in his field, and if he turned them into another field, from which they escaped into that of appellee, it was without the knowledge of appellants. If Conners could be said to be the servant or agent of appellants, his unauthorized acts, we have seen, could not render appellants liable in trespass; but he became a bailee, and entitled to the possession and control of the cattle for the purposes of the bailment, and thus acquired a special property in the cattle; and

Ward v. Brown.

whilst thus in his possession, he was liable for their trespasses, either separately or jointly with Burns.

After the cattle were placed in the hand of Conners, appellants ceased to have any right, during the continuance of the bailment, to possess or control the cattle ; and having no right to control them, upon what principle can they be held liable for the trespasses committed by the cattle ? The liability of the owner of stock for their trespasses proceeds upon the ground that he has their possession and control. If a man were to hire his horse to another for a specified time, and deliver possession to the bailee, and the animal were within that time, and whilst in the bailee's possession, to commit a trespass, no one, we presume, would contend that the owner would be liable, for the reason that the owner would have no control of the animal. And in what does the difference, in principle, consist, between such a case and the one at bar ? In neither does the owner have the control of the property, but in each case it is in the bailee.

In the case of *Rassett v. Cotton*, 31 Penn. 525, it was held that if the owner was liable for the trespasses of his cattle whilst in the possession of an agister, it was in case, and not in trespass ; and we are of the opinion that if he can in such a case be rendered liable at all, it should be in case, and not in trespass. Cases may arise in which the owner would be liable in case, but we see nothing in the facts of this case that would warrant a recovery in that form of action. There is nothing indicating that appellants were guilty of negligence, either in the selection of the bailee or in placing the cattle in his field, or in fact the omission of any duty that devolved upon them. Had they selected a reckless and irresponsible bailee, and had they known, or had reason to believe, the cattle would commit the trespass when they were placed in his hands, it might be the owners would have been liable in case ; but there is no evidence of such facts in this case.

The judgment of the court below is reversed.

Judgment reversed.

Marsh v. The Fairbury and North-western Railway Company.

MARSH V. THE FAIRBURY AND NORTH-WESTERN RAILWAY COMPANY.

(64 Ill. 414.)

Contract limiting location of railroad depot.

Action to enforce specific performance of a contract to locate a railroad depot upon plaintiff's land and at no other point in the town. *Held*, that the contract was void as against public policy.*

BILL for specific performance. The opinion states the case.

A. E. Harding and J. B. Young, for plaintiff in error.

L. E. Payson and Pillsbury & Lawrence, for defendants in error.

SHELDON, J. This was a bill in chancery, filed to enforce the specific performance of a contract made by the Fairbury, Pontiac and North-western Railway Company "to locate passenger and freight depots of said road in Marsh's addition to Fairbury, and at no other point in said town."

The court below sustained a demurrer to the bill, and dismissed it.

This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad companies are incorporated by authority of law not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity, the general welfare being largely dependent upon these modes of inter-communication, and the manner of carrying on their operations.

The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court:

* See to same effect *St. Joseph, etc., Railroad Co. v. Ryan*, 15 Am. Rep. 337.

Wilson v. The Ohio and Mississippi Railroad Company.

and in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public. *Raphael v. Railway Co.*, Law Rep., 2 Eq. Cases, 37. The location of railroad depots has much to do with the accommodation of the wants of the public.

And when once established, a change of affairs may require a change of location, in order to suit public convenience.

We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantage of such individual.

Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require.

To grant the relief asked for by the complainant, we would regard as against public policy; and he must be left, for whatever remedy he may have, to his suit at law for damages.

The court below properly sustained the demurrer, and dismissed the bill.

The decree of the court below is affirmed.

Decree affirmed.

WILSON V. THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

(64 Ill. 542.)

Statute — repeal — pending proceedings.

A statute imposed a penalty of \$50 for certain offenses. A subsequent statute amended the former so as to authorize a penalty of not exceeding \$100, and contained a proviso that the second act should not apply to proceedings pending under the first, except so far as to change the amount of the penalty. *Held*, (1) that the first act was repealed by the second; (2) that the proviso in the latter was unconstitutional as an *ex post facto* law; and therefore (3) that prosecutions pending under the first act were defeated by the passage of the second.

Wilson v. The Ohio and Mississippi Railroad Company.

It is a general rule that, where a statute imposes a new penalty for an offense, it repeals, by implication, so much of the former statute as established a different penalty. Sedgwick on Stat. and Const. Law, 125.

But the second section of the act of 1869 repeals the penalty of the act of 1849, so far as related to existing suits, by express language, thus: "This act shall not apply to suits now pending under the section hereby amended, except that the penalty recoverable in such suits shall be not exceeding \$100, instead of \$50, as therein provided."

These words leave no room for doubt that the intention of the law-maker was to repeal the 38th section of the act of 1849.

But, inasmuch as the act of 1869, allowing a latitude of discretion in respect to the penalty from one cent to \$100, is inconsistent with and repugnant to that of 1849, directing a *peremptory* penalty of \$50, it necessarily follows that the act of 1849 is repealed by that of 1869, except so far as saved by the second section of the latter act, but that such second section, which expressly purports to substitute a new punishment for violations of the act of 1849 already committed, and for which suits were then pending, must be regarded as an *ex post facto* law, and void.

An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed, whether by personal or pecuniary penalties. Sedg. on Stat. and Const. Law, 599; *Fletcher v. Peck*, 6 Cranch, 138.

It only remains to consider the effect of the repeal of the 38th section of the act of 1849, under which this suit was brought, after its commencement and before judgment. That question is settled by the case of *Van Inwagen v. The City of Chicago*, 61 Ill. 31. There this court said: "The effect of a repealing statute is to obliterate the prior laws as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law." *Ray v. Goodwin*, 4 Moore & Payne, 341; Dwarries on Stat. 676.

Upon this principle, the repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it, pending at the time of the repeal. Sedg. 130, and cases in notes.

Walsh v. The People.

We are of opinion the case was properly disposed of in the court below, and its judgment is, therefore, affirmed.

Judgment affirmed.

WALKER, SCOTT, and CRAIG, JJ.: We do not concur in this opinion.

WALSH V. THE PEOPLE.

(35 Ill. 53.)

Indictable offenses — proposal to receive bribe.

A proposal by a public officer to receive a bribe is an indictable offense at common law.

INDICTMENT for proposing to receive a bribe. The opinion states the case.

John Van Arman and Emory A. Storrs, for plaintiff in error.

Charles H. Reed, State's Attorney, for the people.

THORNTON, J. The defendant below was an alderman of the common council of the city of Chicago. As such, he was indicted for a proposal, made by himself, to receive a bribe, to influence his action in the discharge of his duties.

The indictment is, in form, an indictment at common law; and it is conceded that the statute has not created such an offense against an alderman. Our criminal code has made it an offense to propose, or agree to receive a bribe, on the part of certain officers; but an alderman is not, either in terms or by construction, included amongst them. Rev. Stat. 1845, p. 167, § 87.

It is contended that the act charged does not fall within any of the common-law definitions of bribery; that no precedent can be found for such an offense, and that, as propositions to receive bribes have probably often been made, and as no case can be found in which they were regarded as criminal, the conclusion must follow that the offense charged is no offense.

The weakness of the conclusion is in the assumption of a premise, which may or may not be true. This particular phase of depravity may never before have been exhibited; and if it had been, a change might be so suddenly made, by an acceptance of the offer and a concurrence of the parties, as to constitute the offense of bribery, which consists in the receiving any undue reward to incline the party to act contrary to the known rules of honesty and integrity.

But the character of a particular offense cannot fairly be determined from the fact that an offense exactly analogous has not been described in the books. We must test the criminality of the act by known principles of law.

At common law, bribery is a grave and serious offense against public justice; and the attempt or offer to bribe is likewise criminal.

A promise of money to a corporator, to vote for a mayor of a corporation, was punishable at common law. *Ree v. Plympton*, 2 Lord Raym. 1377.

The attempt to bribe a privy councillor, to procure an office, was an offense at common law. *Ree v. Vaughan*, 4 Burr. 2494. In that case, Lord MANSFIELD said: "Wherever it is a crime to *take*, it is a crime to *give*. They are reciprocal. And in many cases, especially in bribery at elections to parliament, the *attempt* is a crime. It is complete on *his* side who *offers* it."

Why is the mere unsuccessful attempt to bribe criminal? The officer refuses to take the offered reward, and his integrity is untouched — his conduct uninfluenced by it. The reason for the law is plain. The offer is a sore temptation to the weak or the depraved. It tends to corrupt, and, as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may affect prejudicially the morals of the community.

The attempt to bribe is, then, at common law, a misdemeanor; and the person making the offer is liable to indictment and punishment.

What are misdemeanors at common law? Wharton, in his work on Criminal Law, p. 74, says: "Misdemeanors comprise all offenses, lower than felonies, which may be the subject of indictment. They are divided in two classes: first, such as are *mala in se*, or penal at common law; and secondly, such as are *mala prohibita*, or penal by statute. Whatever, under the first class, mischievously affects

Walsh v. The People.

the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official duty, when done corruptly, is the subject of indictment."

In the case of *The King v. Higgins*, 2 East, 5, the defendant was indicted for soliciting and inciting a servant to steal his master's chattels. There was no proof of any overt act toward carrying the intent into execution, and it was argued, in behalf of the prisoner, that the solicitation was a mere fruitless, ineffectual temptation — a mere wish or desire.

It was held, by all the judges, that the soliciting was a misdemeanor, though the indictment contained no charge that the servant stole the goods, nor that any other act was done except the soliciting.

Separate opinions were delivered by all the judges.

LORD KENYON said the solicitation was an act, and it would be a slander upon the law to suppose that such an offense was not indictable.

GROSS, J., said an attempt to commit a misdemeanor was, in itself, a misdemeanor. The gist of the offense is the incitement.

LAWRENCE, J., said: "All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable;" and that the mere soliciting the servant to steal was an attempt or endeavor to commit a crime.

LE BLANC, J., said that the inciting of another, by whatever means it is attempted, is an act done; and if the act is done with a criminal intent, it is punishable by indictment.

An attempt to commit an offense, or to solicit its commission, is at common law punishable by indictment. 1 Hawk. P. C. 55; Whart. Cr. Law, 78 and 872; 1 Russ. on Cr. 49.

While we are not disposed to concur with Wharton, to the full extent, in the language quoted, that every act which might be supposed, according to the stern ethics of some persons, to be injurious to the public morals, to be a misdemeanor, yet we are of opinion that it is a misdemeanor to propose to receive a bribe. It must be regarded as an inciting to offer one, and a solicitation to commit an offense. This, at common law, is a misdemeanor. Inciting another to the commission of any indictable offense, though without success, is a misdemeanor. 3 Chitty's Cr. Law, 994; 1 Russ. on Cr. 49, *Cartwright's case*; Russ. & R. C. C. 107, note b; *Rex v. Higgins*, 2 East, *supra*.

As we have seen, the mere offer to bribe, though it may be rejected, is an offense; and the party who makes the offer is amenable to indictment and punishment. The offer amounts to no more than a proposal to give a bribe; it is but a solicitation to a person to take one. The distinction between an offer to bribe and a proposal to receive one is exceedingly nice. The difference is wholly ideal. If one man attempt to bribe an officer, and influence him, to his own degradation and to the detriment of the public, and fail in his purpose, is he more guilty than the officer, who is willing to make sale of his integrity, debase himself, and who solicits to be purchased, to induce a discharge of his duties? The prejudicial effects upon society are at least, as great in the one case as in the other; the tendency to corruption is as potent; and when the officer makes the proposal, he is not only degraded, but the public service suffers thereby.

According to the well-established principles of the common law, the proposal to receive the bribe was an act which tended to the prejudice of the community; greatly outraged public decency; was in the highest degree injurious to the public morals; was a gross breach of official duty, and must therefore be regarded as a misdemeanor, for which the party is liable to indictment.

It is an offense more serious and corrupting in its tendencies than an ineffectual attempt to bribe. In the one case, the officer spurns the temptation, and maintains his purity and integrity; in the other, he manifests a depravity and dishonesty existing in himself, which, when developed by the proposal to take a bribe, if done with a corrupt intent, should be punished; and it would be a slander upon the law to suppose that such conduct cannot be checked, by appropriate punishment.

In holding that the act charged is indictable, we are not drifting into judicial legislation, but are merely applying old and well-settled principles to a new state of facts.

We are compelled, however, to reverse, upon the evidence, and shall not therefore further allude to the law of the case, or to the errors assigned upon instructions given and refused.

The defendant was found guilty, upon the unsupported testimony of one Goggin; and it appears that there were two persons of the name of Walsh, referred to by Goggin, in his numerous conversations; one was a member of the board of education,

and the other, the present defendant, was a member of the common council of Chicago.

After the date, as fixed by Goggin, of the proposal, on the part of the defendant, to receive a bribe, Goggin said to one Young that he had agreed to give \$2,000 to Walsh, but that he now demanded \$4,000. Young replied there are two persons of that name; "which one is it?" Goggin said: "It is Walsh of the board of education; the alderman is a gentleman."

Goggin complained to one Miller that the defendant had prevented him from selling his lot to the city, and said: "I will get a chance at him some of these days."

He also said to Donovan: "Walsh is my bitterest enemy, and I will do every thing in my power to send him up."

To Cullerton: "I have nothing against any alderman but Jim Walsh; and, by —, I will fix him, if swearing will do it."

To Gustave Busse: "All I want is Walsh — that d——d scoundrel; I want to go for him. If I can bring him to the penitentiary, I am going to do it."

To Fred. Busse: "There is only one man I want to go for — Walsh. If I can get on the stand, if I don't fix him, and get him in the penitentiary!"

Upon cross-examination, Goggin denied all hostility, and any expressions of hostility, toward the defendant; and he also denied the conversation testified to by Young.

We might make further reference to the evidence, but enough has been cited to show a deep feeling of hostility, on the part of the witness, toward the defendant, and a determination to have him convicted, if false swearing could do it. We must credit the numerous witnesses who contradict the prosecutor. He is therefore impeached, and, to a great extent, rendered unworthy of belief. He cannot have sworn to the truth, if we believe the impeaching witness; or if upon the trial he testified truly, then he made willfully false statements, to divers persons, before the trial.

Not only is there a reasonable doubt created as to the guilt of the accused, but the mind is forced to the conclusion that the prosecution was the result of personal animosity, and was carried on for the gratification of malicious feeling. There is no safety to the good, or virtuous, or innocent, if convictions can be had upon the testimony presented in this record.

In a case involved in so much doubt, the good character of the

accused, abundantly proved, was entitled to great weight. A large number of witnesses testified that his general reputation for honesty and integrity was good,

Under all the circumstances, it is almost incredible that a verdict of guilty was obtained.

The judgment is reversed and the cause remanded.

Judgment reversed.

Mr. Justice BREESE. I concur in reversing the judgment, but do not concur in all the views presented in this opinion.

Mr. Justice SCOTT. I concur in reversing the judgment in this case, but dissent from the views expressed in the opinion of the majority of the court.

There is no statute in this State which defines the offense for which the plaintiff in error was indicted and convicted. It is a common-law indictment, and it was sought to charge him with having, in his official capacity, offered to receive a bribe.

The indictment alleges that the plaintiff in error, "on the 1st day of December, 1871, then a member of the common council of the city of Chicago, to wit, an alderman, did then and there unlawfully, wickedly, corruptly, and contrary to his duty as such alderman, propose to receive, as a bribe, of and from William Goggin, a large sum of money, to wit, the sum of \$4,000, to induce him, the said Walsh, as such alderman, to use his influence with favor, as such alderman, to induce and secure the purchase by said common council, of said William Goggin, for said city of Chicago, for the place whereon to erect a public school-house," certain real estate, it being the duty of said common council to purchase real estate for said city whereon to erect school-houses, contrary to law, etc.

The only question of any importance presented by the record is, whether there is any such offense known to and indictable at common law as an *offer* by any officer to receive a bribe for his influence, in his official capacity, to induce his favorable action, for corrupt and improper purposes.

Bribery, at common law, is defined to be "the receiving or offering any undue reward by or to any person whatever whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and

Walah v. The People.

integrity." But in a more extended and enlarged sense, it may be committed by any person in an official situation who shall corruptly use the power and interest of his place for rewards or promises, and by any person who shall give or offer or take a reward for offices of a public nature. 3 Greenleaf, § 71 ; 1 Russell on Crimes, 154 ; 4 Bl. Com. 139.

In England the offense of taking bribes was punished in inferior officers with fine and imprisonment, and in those who offer a bribe, though not taken, the same. 4 Bl. Com. 140.

It is said that the law abhors the least tendency to corruption, and upon the principle that an attempt to commit a misdemeanor is itself a misdemeanor. Attempts to bribe public officers, though unsuccessful, have been held to be criminal. The object was to preserve purity in official conduct, and in the administration of justice ; and the tendency of the bribe being to corrupt official conduct, and pervert justice, he who received and he who offered the bribe were alike punished.

In no definition of bribery that I have seen does it include a mere offer on the part of an officer to be himself bribed. No reference has been made to any elementary work, or to any adjudged case that gives such a definition, and I am persuaded that no such authority can be found.

Bribery is punished on the ground that it tends to produce official misconduct or to corrupt the administration of justice. It is difficult to understand how a mere offer on the part of an officer to receive a bribe could come within the reason of the rule. A party who would express a willingness to receive a bribe for his official influence is necessarily corrupt, but no intrinsic motive is brought to bear on him by a mere offer on his part not accepted other than his own evil inclinations which previously existed, and hence an offer to receive a bribe does not come within any definition of bribery.

There is no such offense, defined by our statute or the common law, as an offer on the part of an alderman to receive a bribe, as alleged, and the motion to quash the indictment ought to have been allowed, and because it was not sustained, I am of opinion that the judgment ought to be reversed.

I am unable to comprehend how a party may be indicted for an alleged crime wholly unknown to the law, and on the trial be convicted of immoral conduct, even if it be admitted that such conduct

Manufacturers' National Bank v. Barnes.

tends to produce official misconduct, and punished as bribery was punished at common law. It would certainly constitute an anomalous proceeding in criminal jurisprudence.

Nearly, if not all of the misdemeanors defined by common-law writers, which it has been thought necessary to be punished, have been defined in our criminal code, and provision made for the summary punishment before justices of the peace, and by indictment, and in my judgment it is against the policy of our laws to permit indictments for such offenses not defined by statute.

MANUFACTURERS' NATIONAL BANK, appellant, v. BARNES.

(65 Ill. 69.)

Agency — expiration of special agency — presumption of authority.

Plaintiff, being about to leave home for a short time, gave his clerk a power of attorney to draw checks on a bank for fifteen days, and deposited the power of attorney with the bank. Plaintiff returned, but the clerk continued to draw checks on the bank for several months. Meanwhile the bank-book of plaintiff had been several times written up, but as the clerk was plaintiff's cashier, the fact that he had been drawing checks after the power of attorney expired, had not been discovered by plaintiff. Certain amounts, so drawn, were used by the clerk for his own purposes. *Held*, that the bank was liable for such amounts. The bank was guilty of negligence in paying checks of the clerk drawn after the expiration of the power of attorney, and could not be excused because plaintiff had failed to examine the returned checks and bank-book.

ACTION against a bank for balance due on deposits. The opinion states the case.

Beckwith, Ayer & Kales, for appellant.

Lyman & Jackson, for appellees.

LAWRENCE, C. J. This action was brought by Barnes & Co. to recover from the bank a balance claimed to be due on deposits made by the plaintiffs with the bank. The deposits were admitted.

Manufacturers' National Bank v. Barnes.

but the defense set up was payment to the plaintiffs' clerk, under the following circumstances:

It appears that on the 22d of June, 1870, Barnes, the resident partner at Chicago, and the only person authorized to draw checks, being obliged to leave the city for a short time, gave to a clerk, employed by him as book-keeper and cashier, a power of attorney authorizing him to draw checks on the bank for fifteen days. This power of attorney was lodged with the bank, a conversation having been previously had with the assistant cashier in regard to it.

On the 7th of July, Barnes returned and resumed the charge of his business. Nevertheless, the clerk continued to draw occasional checks, signing the name of Barnes, with the initial letter of his own name, to indicate his agency. He continued to check until the following January, the whole amount drawn being \$4,547.94. Of this sum, the clerk had used \$1,509.39 in paying the debts of the firm, but without the knowledge of Barnes. During this interval, the bank-book of the firm had been several times written up, and the paid checks returned; but as this had been attended to by the same clerk, acting in his capacity of book-keeper and cashier, the fact that he had been drawing checks after the power of attorney had expired was not discovered by the plaintiffs until January. Judgment was obtained in the Supreme Court for the amount of the checks drawn by the clerk, less the sum applied by him to the debts of the firm, for which the plaintiffs gave the bank credit.

The case was tried by the court without a jury, and it is insisted the court erred in rendering judgment for any greater sum than the amount checked out by the clerk before the bank-book, or pass-book, of the plaintiffs was written up the first time, when all the checks were returned to the plaintiffs. It is claimed that, from that date at least, the bank had the right to presume that the clerk had authority to draw checks.

There is, at first blush, a certain plausibility in this view, but it will not bear examination. The same question arose in the case of *Weiser v. Denison*, 10 N. Y. 68. There, as here, a clerk had drawn checks in the name of his employer, and the pass-book had been several times written up and the checks returned before discovery of the fraud. The court held that the balancing of the pass-book and the return of the checks are for the protection of the depositor, and not for that of the bank, and the failure of the depositor to

examine the checks is not such negligence on his part as to exonerate the bank from liability for the continued payment of checks improperly drawn. We do not agree with counsel for appellant in regarding the present case as stronger for the bank than that. In the case before us, the checks drawn by the clerk showed upon their face that they were drawn by him, and the bank knew, by a document in its own possession, and which had been made the subject of a special conversation with one of its officers, that the clerk had authority to draw checks only for fifteen days from the 22d of June. The facts that the plaintiff had been thus careful to give the clerk express written authority, and to limit it to fifteen days, and to lodge this authority with the bank in pursuance of a previous arrangement, were sufficient to show the bank that the plaintiff had no intention of giving to the clerk a general authority to draw. The bank was guilty of great negligence in paying checks of the clerk drawn after that period, and cannot be excused merely because the plaintiff failed to examine the returned checks, which he had a right to presume had been drawn by himself alone.

We consider the reasoning of the New York Court of Appeals, in the case cited, very satisfactory, and adopt its decision as the better rule.

The judgment is affirmed.

Judgment affirmed.

MARTIN, appellant, v. ROBSON.

(65 Ill. 129.)

Husband and wife — responsibility of husband for wife's torts.

Under the Illinois statutes giving to the wife the control of her separate property, and of her own earnings, the husband is not liable for torts of the wife committed during coverture when he was not present, and in which he in no manner participated.

ACTION on the case by the appellee against Margaret Martin and John Martin, her husband. The plaintiff recovered a verdict for slanderous words spoken by Margaret Martin. The opinion

Martin v. Robson.

states the case. The statutes, the effect of which is involved, are as follows :

Laws of 1861. "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman, hereafter married, owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person, other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profit thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried ; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

Laws 1869. "A married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her name, free from the interference of her husband or his creditors. *Provided*, this act shall not be construed to give to the wife any right to compensation for any labor performed for her minor children or husband."

Bangs & Shaw and R. F. Winslow, for appellants.

Burns, Barnes & Ong, for appellee.

THORNTON, J. Since the passage of the acts of 1861 and 1869 (Session Laws of 1861, 143, and of 1869, 255), is the husband liable for the torts of the wife during coverture, committed when he was not present, and in which he in no manner participated ?

Those statutes give to the wife, during coverture, the sole control of her separate estate and property acquired in good faith from any person other than her husband, and her own earnings for labor performed for any person other than her husband or minor children, with the right to use and possess the property and earnings, free from the control or interference of her husband.

In determining the intent, object and effect of these enactments, it will be interesting to place, in juxtaposition, the rights and duties, liabilities and disabilities of husband and wife, incident to the marriage union, as they existed at common law, and the changes made by the statute.

At common law he had control, almost absolute, over her person; was entitled, as the result of the marriage, to her services, and, consequently, to her earnings; to her goods and chattels; had the right to reduce her *choses in action* to possession, during her life; could collect and enjoy the rents and profits of her real estate; and thus had dominion over her property, and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him; and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law.

As a necessary consequence, he was liable for the debts of the wife *dum sola*, and for her torts and frauds committed during coverture. If they were done in his presence, or by his procurement, he alone was liable; otherwise they must be jointly sued.

Now, he cannot enjoy the profits of her real estate without her permission. He has no control over her separate personal property. It is not subject to his "disposal, control or interference." Language could not be more explicit. All her separate property is "*under her sole control, to be held, owned, possessed and enjoined by her the same as though she was sole and unmarried.*" He has no right to use or dispose of a horse or a cow, without her consent. He can no longer interfere with her *choses in action*. They are under her sole control. The product of her labor is her exclusive property. She alone can sue for and enjoy it. Any suit for her earnings must be in her own name, and she may use and possess them free from the interference of her husband or his creditors.

The language of the statute of 1869 is: "That a married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband."

The words, "free from the interference of her husband," apply as well to the right to receive, use and possess, as to the right to sue for her earnings. The right, therefore, to receive and use her own earnings, uncontrolled by the husband, is conferred in express terms. The practical enjoyment of this right presupposes the right to appropriate her own time. The right to take and possess the wages of labor must be accompanied with the right to labor. If the husband can control, then the statute has conferred a barren right. If the wife can still only acquire earnings with his consent, then the statute was wholly unnecessary, for she might have done

Martin v. Robson.

this prior to its enactment. The clear intent of the statute is, not alone to give to the wife the right to accept and use her earnings, but the right to labor and thus acquire them.

The intention of the legislature to abrogate the common-law rule, to a great degree, that husband and wife were one person, and to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common-law rule, that the husband is liable for the torts of the wife, they have made such modification of his rights and her disabilities, as wholly to remove the reason for the liability.

The rights acquired by the husband by virtue of the marriage have almost all been taken away; and the disabilities of the wife have nearly all been removed. She now controls her own estate entirely, except that, by construction of the courts, she cannot convey her real estate without her husband. This, however, is solely for her protection, and to prevent the squandering of the estate. He has now only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests during the life of the wife. This is rather a shadowy estate. It is an interest which may possibly ripen into something tangible in the uncertain future. Previous to the act of 1861, it could be sold on execution against the husband; now, the wife has the sole control of her real estate during her life, and the husband has no interest until her death. She must sue alone for breach of covenant in a deed to her. This estate, at best, is now a bare possibility. *Cole v. Van Riper*, 44 Ill. 58; *Beach v. Miller*, 51 id. 206.

A liability which has for its consideration rights conferred, should no longer exist when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved.

For the policy and wisdom of the legislation which has effected a change so radical, the legislature alone is responsible. The courts must guard against a construction which might prove mischievous, and result in a practical divorcement of man and wife, if such construction can be avoided.

In *Cole v. Van Riper*, *supra*, this court said that the legislature

never could have intended, by the enactment of 1861, to loosen the bonds of matrimony, or to enable the wife, at pleasure, to effectuate a divorce *a mensa et thoro*, or to confer the power to restrict the husband to the use of a particular chair, or to forbid him to take a book from the library without her permission. We shall not insist that such unwifelike conduct can even be justified since the law of 1869.

The inquiry is therefore pertinent, what is left of the nuptial contract? What duties and obligations still exist?

As the result of the marriage vow, and as part of the contract, the wife is still bound to love and cherish the husband, and to obey him in all reasonable demands not inconsistent with the exercise of her legal rights; to treat him with respect, and regard him at least as her equal; and he is still bound to protect and maintain her, unless she should neglect wholly her marital duties as imposed by the common law, or assume a position to prevent their performance, and thus deprive him of her society, mar the beauty of married life, and disregard the household good.

These duties and obligations upon husband and wife were not the result of the arrangement of their property at common law, but of the contract of marriage and the relation thereby created. By the marriage she became one of his family, and he was bound to provide her a home, and necessities there, but not elsewhere. He must furnish her with necessities, from a principle of duty and justice. 2 Kent's Com. 148.

"The duties of the wife, while cohabiting with her husband, form the consideration of his liability for her necessities. *McCutchen v. McGahay*, 11 Johns. 281. This doctrine is approved by Kent in his Commentaries, 2d Vol., p. 146.

The argument urged to maintain the responsibility of the husband for the torts of the wife, because he may still be bound to provide necessities, is not appropriate. Upon the marriage, at common law, his assent to her contracts for necessities was presumed, upon proof of cohabitation. If she eloped, though not with an adulterer, the husband was not chargeable even for necessities. But elopement did not release him from liability for her debts *dum sola*, or for her torts.

The rule at common law, as to the liability for necessities, is, if a man, without justifiable cause, turns away his wife, he is bound for her contracts for necessities suitable to her degree and estate.

Martin v. Robson.

If they live together, and he will not supply her, or the necessary means, she then can pledge his credit for necessities strictly ; but if he provides for her, he is not bound by her contracts, unless there is evidence to prove his assent. He is not bound by her contracts, unless they are made by his authority or with his concurrence, except he makes no provision for her. *Montague v. Benedict*, 3 Barn & Cress. 631 ; *Montague v. Espinasse*, 1 Car. & Payne, 502 ; *Atkins v. Curwood*, 7 id. 756.

The plain reason for the obligation was the cohabitation, or the right to enforce it, and the consequent right to her obedience and services.

Even though she lived separate from him, supported her children, and earned a salary, the party owing her had no right to pay her, after notice from the husband not to do so. He could, in such case, sue for and recover the salary. *Glover v. Proprietors of Drury Lane*, 2 Chitty, 117.

Now, how changed ! Her earnings, except for services she may render to him and his minor children, are her exclusive property, whether living apart from or with him.

No principle is better settled, at common law, than that the husband is not liable for necessities furnished to the wife, if she leaves him without any fault on his part. But he was responsible for her torts until a dissolution of the marriage, even in case of separation.

Where the husband and wife lived apart, and she published a libel of a third person, he was held to be answerable, notwithstanding the separation. *Head v. Briscoe and Wife*, 5 Car. & Payne, 485.

The foundation for the liability in the two cases is different. In the one case it was based upon cohabitation, and the enjoyment of the society and services of the wife, as a necessary consequence. In the other case it rested more particularly, if not exclusively, upon the fact that the husband became the absolute owner of her personal property, and had the right to receive the rents and profits of her real estate.

It is also urged, as a reason for the continued liability of the husband for the torts of the wife, that this obligation was imposed upon him at common law, whether she was poor or wealthy, and that therefore the statutes have produced no different rule.

If she did not enrich him with property — if she did not endow him with gold — she endowed him with a nobler gift and a greater excellence. She enriched him with her society, advised and en-

couraged him as one who had no separate interests, and freely gave to him her time, industry and skill. As a means of paying her debts, and damages for her torts, her counsel and earnings might be as important as her accumulated property.

The distinction between the liability of the husband for the contracts of the wife before marriage, and for her torts during marriage,—as for slander uttered by her alone,—is too dim to be easily seen. He was made liable for her debts at the period of marriage, because the law gave to him all her personal estate in possession, and the power to recover her personal property in action. Bright's *Husb. and Wife*, 2d Vol., p. 2.

He was bound to pay her indebtedness, because he adopted her and her circumstances together. *Black.*, B. 1, p. 443.

The law made him liable to the debts to which he took her subject, because he acquired an absolute interest in her personal property, had the receipt of the rents and profits of her real estate during coverture, and was entitled to whatever accrued to her, by her industry or otherwise, during the same period. *Steph. Nisi Prius*, Vol. 1, p. 726.

The reason for the liability, according to some authorities, is that, by the marriage, the wife was deprived of the use and disposal of her property, and could acquire none by her industry, as her person and earnings belonged to the husband. *Tyler on Inf. and Cov.*, § 216.

The same author, after declaring the husband's liability for the debts and torts of the wife, says: "The reason assigned for such liabilities at common law is, that he was entitled to the rents and profits of the wife's real estate during coverture, and to the absolute dominion over her personal property in possession." § 233.

The common law was never guilty of the absurdity of imposing obligations so onerous without conferring corresponding rights. Hence, besides the rights of property, the legal pre-eminence was exclusively vested in the husband. He was answerable for her misbehavior, and hence had the right of restraint over her person. *Black.*, B. 1, p. 444.

Lord KAIMES, in his sketches, says: "The man bears rule over his wife's person and conduct; she bears rule over his inclinations; he governs by law, she by persuasion."

In the matter of *Cochrane*, 8 Dowl. P. C. 632, the wife was, upon the hearing or a writ of *habeas corpus*, restored to her husband upon

the principle that she was under his guardianship, and that the law entitled him, "for the sake of both, to protect her from the danger of unrestrained intercourse with the world, by enforcing cohabitation and a common residence."

So long as the husband was entitled to the property of the wife and to her industry, so long as he had power to direct and control her, and thus prevent her from the commission of torts, there was some reason for his liability. The reason has ceased. The ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. The foundations hitherto deemed so essential for the preservation of the nuptial contract, and the maintenance of the marriage relation, are crumbling. The unity of husband and wife has been severed. They are now distinct persons, and may have separate legal estates, contracts, debts and injuries.

To this conclusion have all the decisions of this court tended. So far as the separate personal property of the wife is concerned, she is now the same as *feme sole*. She need not join her husband with her in a suit to recover it, or for the trespass to it, as her rights only are affected, and she must sue alone for any invasion of them. She may even prosecute a suit against her husband for any unlawful interference with her property, contrary to her wishes. *Emerson v. Clayton*, 32 Ill. 493.

The right of action for personal injuries to the wife is property. She may sue alone for the recovery of damages for such injuries, and the husband cannot, without her consent, release them. *C. B. & Q. R. R. Co. v. Dunn*, 52 Ill. 260; S. C., 4 Am. Rep. 606.

In the same case it is said that she can maintain, in her own name, an action for slander of her character. If she alone is entitled to receive, and appropriate to her own use, damages recovered for slander of herself, she should answer for her slander of others.

Until the law of 1869, this court adhered to the common-law rule, that the husband was responsible for the debts of the wife contracted before marriage. It was repeatedly declared that the liability rested, not only upon the fact that the husband, upon the marriage, became the owner of the wife's personal property, when reduced to possession, and of a life estate in her realty, but upon the ground that he was entitled to the entire proceeds of her time and her labor, and that, notwithstanding the law of 1861, he was

still entitled to her earnings. *Conner v. Berry*, 46 Ill. 371; *McMurry v. Webster*, 48 id. 123.

The last decision was made in 1868. Then followed the law of 1869.

In the first adjudication made under it, it was held that, as she now owned separate property, and enjoyed her own earnings, she must pay the costs incurred in attempting to maintain her rights. *Musgrove v. Musgrove*, 54 Ill. 186.

In *Howarth v. Warmser*, 55 Ill. 48, the husband was declared to be discharged from his former liability to pay the debts of the wife contracted before marriage, by force of the legislation under consideration.

A married woman may now be sued at law upon her contracts as to her separate property. *Cookson v. Toole*, 59 Ill. 515.

She may now execute a valid lease of her separate real estate without joining her husband, and without his consent. *Parent v. Calleraud*, 64 Ill. 97.

So diverse are the rights and interests, the duties, obligations and disabilities of husband and wife now that it would be most unreasonable to hold him still liable for the torts committed without his presence and without his consent or approbation. If he is not bound to pay her debts, why should he be responsible for her torts? When the ground-work is gone as to one, it is gone as to the other, and the structure of the past must fall before the innovations of the present.

She is now, to a very great extent, independent of him, and is clothed with rights and powers ample for her own protection; and, so far as her separate property is concerned, is responsible for her debts and contracts, with reference to it. They are not one, as heretofore. They are one in name, and are bound by solemn contract, sanctioned by both divine and human law, to mutual respect; should be of the same household, and one in love and affection.

But a line has been drawn between them, distinct and ineffaceable, except by legislative power. His legal supremacy is gone, and the sceptre has departed from him.

She, on the contrary, can have her separate estate; can contract with reference to it; can sue and be sued, at law, upon the contracts thus made; can sue, in her own name, for injury to her person and slander of her character, and can enjoy the fruits of her time and labor free from the control or interference of her husband.

Rockford, Rock Island and St. Louis R. R. Co. v. Sage.

The chains of the past have been broken by the progression of the present, and she may now enter upon the stern conflicts of life untrammelled. She no longer clings to and depends upon man, but has the legal right and aspires to battle with him in the contests of the forum ; to outvie him in the healing art ; to climb with him the steps of fame, and to share with him in every occupation. Her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself.

Our opinion is, that the necessary operation of the statutes is to discharge the husband from his liability for the torts of the wife, during coverture, which he neither aided, advised nor countenanced.

The judgment is reversed and the cause remanded.

Judgment reversed.

SHELDEN, BREESH and SCOTT, JJ., dissented.

ROCKFORD, ROCK ISLAND AND ST. LOUIS R. R. CO., appellant, v. SAGE.

(35 ILL. 223.)

Corporation — when not liable to pay for services of director.

The law does not imply a promise on the part of a railroad company to pay its directors, for services as such.

Directors of a railroad company agreed to allow themselves \$1,000 each, for services and expenses, but no formal resolution to that effect was adopted by the board of directors. *Held*, that the company was not liable to a director for his services and expenses.

A corporation is not liable for services performed or expenses incurred prior to its organization.

ACTION by a railroad director for services rendered the company. The facts appear in the opinion.

Charles M. Osborn and Henry & Johnson, for appellant.

Sackett & Bennett, for appellee.

Rockford, Rock Island and St. Louis R. R. Co. v. Sage.

SHELDEN, J. This was an action of assumpsit, by Sage, against the railroad company, to recover for money paid for surveying done before the company was organized or its charter granted, and for services and expenses as director of the company, and for \$1,000 due on an account stated.

A recovery was had for \$1,000, which, under the evidence, must have been upon what was found to be an account stated.

The defendant appeals.

On the trial below, the plaintiff offered in evidence the following :

“ Rockford, Rock Island and St. Louis Railroad Company,

“ To Ralph Sage, Dr.

“ To money expended and services rendered, - - \$1,000

“ STERLING, June 3, 1868.

“ (Indorsed.) Approved by the executive committee.

“ WM. PRATT,

“ WM. S. THOMAS.”

With proof that Pratt and Thomas were members of the executive committee of the company.

The company was organized some time in the year 1865, the charter having been obtained in the winter of 1865. Plaintiff acted as director about two years. After he had ceased to be director, he presented this bill for services and expenses as director, during all the time he was such, and as commissioner to receive subscriptions for stock. Plaintiff testified to having paid \$50 for surveying in the fall of 1864. It was in evidence that while Greene, Irwin & Co. were negotiating for the road, and as it was about to pass into their hands, the directors of the road talked the matter over among themselves, and they agreed to allow themselves (Sage among the rest) \$1,000 each, for services and expenses.

There was evidence tending to show that Sage's claim was talked over in the board of directors as an organized board, and that it was agreed Sage should have \$1,000.

The following was one of the by-laws of the company :

“ ARTICLE 6. Whenever any bill against the company shall have been certified correct by a majority of the executive committee, it shall be the duty of the president or vice-president to draw an order on the treasurer for the amount thereof, and of the secretary to countersign the same, which order shall constitute a duly author-

Rockford, Rock Island and St. Louis R. R. Co. v. Sage.

ized voucher against the company, payable by the treasurer from any funds in his hands."

The executive committee consisted of five members. This bill having been approved by only two of them, it was not properly audited by the executive committee in pursuance of the by-law.

In *Am. Cent. R. R. Co. v. Miles*, 52 Ill. 174, this court recognized and adopted the rule that the law does not imply a promise on the part of railway companies to pay their directors as such, and that it should appear that a by-law or a resolution of the board had been adopted to compensate them for services, before a director can recover for them. Neither such by-law nor resolution here appears. Although there is the testimony of one witness that the matter was talked over by the board when in session, and that it was agreed that Sage should have \$1,000, the witness will not be positive about any action or vote of the board. He says it was concluded to have it put in the shape of a bill, and that he, and Thomas, another member of the executive committee, put their names on the bill, in accordance with the wishes of the board. The record book of the meetings and proceedings of the company shows nothing on the subject of the allowance of the claim, and shows no record of any meeting of the board of directors held between the 16th day of April, 1868, and June 4, 1868; and the record of the meeting of June 4, 1868, shows the following:

"On motion, the following resolution was adopted, to-wit:

"*Resolved*, That the account of Ralph Sage, for services rendered as a director of said company prior to the annual election, in October, A. D. 1867, be referred to a committee, consisting of B. C. Coblentz, James Galt and James E. Abbott."

We find nothing in the evidence which should be considered as amounting to the adoption of any resolution by the board of directors to pay for these services and expenses, or to pay the bill offered in evidence.

There was some evidence tending to show services rendered and expenses incurred by the plaintiff, since the organization of the company, apart from his duty as a director; for all such, he may recover upon a *quantum meruit*. But there is no proof of such services and expenses to the amount of \$1,000.

For services and expenses before the organization of the company, which, subsequently, the company accepts and receives the benefit of, and promises to pay for, we will not say a party might not

Rockford, Rock Island and St. Louis R. R. Co. v. Sage.

recover, in virtue of such express promise; but we are disposed to deny the right of recovery for such services and expenses upon any implied promise resulting from the fact, although the case cited by appellee's counsel, of *Low v. Conn. Passumpsic River R. R. Co.*, 46 N. H. 284, seems to sanction such a right of recovery; as does also the case of *Hall v. Vt. and Mass. R. R. Co.*, 28 Vt. 401, as respects services rendered subsequent to the act of incorporation, and prior to perfecting the organization of the company, but not for services prior to the act of incorporation.

A right of recovery against a corporation, for any thing done before it had a proper existence, does not appear to rest on any very satisfactory legal principle.

It appears more reasonable to hold any services performed or expenses incurred prior to the organization of a corporation, to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation. It seems unjust to stockholders, who subscribe and pay for stock in a company, that their property should be subject to the incumbrance of such claims, and which they had no voice in creating.

N. Y. and N. H. R. R. Co. v. Ketchum, 27 Conn. 170, is an authority which denies the liability of a corporation on account of services rendered prior to the perfecting of its organization; and we accept the authority of that case as, in our judgment, establishing the more just and satisfactory rule.

In the language of that case, "it is soon enough for corporate bodies to enter into contracts, incumbering their property, when they are duly organized according to their charters and have their chosen and impartial directors to conduct their business. To the same effect are *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59, and *Safety Life Deposit Ins. Co. v. Smith*, 65 Ill. 309.

The judgment must be reversed and the cause remanded.

Judgment reversed.

City of Dixon v. Baker.

CITY OF DIXON, appellant, v. BAKER.

(68 ILL. 518.)

Municipal corporation—liability for injuries to property by raising grade of streets—damage—construction of sewers

By the elevation of the grade of a street in a city surface water flowed into the basement of plaintiff's building, and thereby the building was injured and the walls cracked. *Held*, that the city was liable for the damage, but that plaintiff could not recover damages for inconvenience to his tenants or injury to their personal property.

A city is bound to use reasonable care in the construction of its sewers. (*See note, p. 598.*)

ACTION of trespass on the case. The opinion states the facts.

James K. Edsall and Goodwin & Williams, for appellant.

Eustace, Barge & Dixon, for appellee.

THORNTON, J. This was an action of trespass on the case, brought against the city, to recover damages for flowing surface water upon the lot of plaintiff, by the raising of the grade of the street and sidewalk.

The proof shows that, by the elevation of the grade of the street, on the part of the city, surface water flowed into the basement of the house of the plaintiff, and thereby the building was injured and the walls cracked.

The broad ground is taken that municipal corporations are not liable for damages caused by such flowage of the surface water; that the damages are incidental, and they are not liable for incidental damages.

Before the change of the grade, the building of the plaintiff was two feet above the grade, and the gutters carried off all the surface water. After the change, the water ran over the sidewalk and into the cellar of the plaintiff. From the evidence, this might have been prevented by proper sewerage.

If municipal corporations can raise the grade of streets at discre-

tion, and not provide suitable gutters to carry off the surface water, and thus overflow the lands abutting upon the streets, with impunity, then the owners of lots in our towns and cities are entirely at the mercy of the authorities of the municipality. They may make the premises unhealthful, or may compel the owners of the lots to incur great expense in raising the building to the grade established, or may wholly destroy the property for use. One owner of land has no right, by artificial structures, to turn the surface water from his land upon the land of another, when, without such structures, the flowage never would have taken place. The same principle which controls individuals must control as between towns and cities and individual proprietors. Municipalities hold the streets of towns in trust for the public, and may regulate and establish their grade, but this must be done so as to do no serious injury to owners of abutting lots.

In *Nevins v. The City of Peoria*, 41 Ill. 502, this question was fully considered and the authorities reviewed. It was there held that, while a city has the absolute control over the grade of its streets, and may elevate or lower it at pleasure, yet it has no more power over the streets than a private individual has over his own land; and that its liability for injury to the property of another is the same as that of the private individual. It was further held that if, in the elevation of its streets, it turned water upon the ground and into the cellar of one of its citizens, it must respond in damages for the injury thus occasioned.

That case is decisive of the plaintiff's right in this case, and there was no error in giving the plaintiff's first instruction.

Error is assigned upon the refusal of the court to instruct the jury, in behalf of the city, that it was not liable for injuries resulting from error in judgment of the common council as to the size of the sewers necessary for the passage of the surface water. The evidence is overwhelming that the sewers were insufficient, and the common council might, and ought to have known the fact. The city did not exercise reasonable care in their construction, and the instruction was properly refused.

We think there was error in giving the fifth instruction for plaintiff. The jury were told in it "that they had the right to take into account the injury, if any, to the building and to the lot, and to the use and occupancy of said building, and also any injury to the convenience of the plaintiff and others occupying said building."

Peters v. Lake.

It appears, from the evidence, that the building was occupied by several tenants.

The plaintiff had no right to recover damages for inconvenience to his tenants, or injury to their personal property. He could only recover for injury to the building or premises, or loss sustained by him in consequence of the flowage of the water. The damages caused by loss or inconvenience to others appertains wholly to them.

This instruction may have influenced the verdict; and the judgment is, therefore, reversed and the cause remanded.

Judgment reversed.

NOTE. — See *Simmons v. City of Camden*, 7 Am. Rep. 620; *Dorman v. City of Jacksonville*, id. 253, and note, 260; *City of Aurora v. Reed*, 11 id. 1. See as to compensation to property holders for changes of grade of streets, 12 Alb. Law J. 53; Duty of a Municipal Corporation as to Sewers, *City of Cincinnati v. Penny*, 8 Am. Rep. 73; *Thurston v. City of St. Joseph*, 11 id. 463; and see a review of the New York cases, 10 Alb. Law J. 401. — **RAP.**

PETERS, appellant, v. LAKE.

(66 Ill. 206.)

Evidence in action for criminal conversation.

In an action for criminal conversation with the wife of plaintiff, evidence to show the pecuniary circumstances of the parties at the time of the commission of the offense is admissible. (*See note, p. 596.*)

ACTION for criminal conversation. The opinion states the case.

L. E. Payson, for appellant.

Pillsbury & Lawrence, for appellee.

MCALLISTER, J. This was an action on the case, brought in the Livingston Circuit Court, by Lake, against Peters, for criminal conversation with Lake's wife. There was a plea of not guilty, and of accord and satisfaction, on which issue was joined.

On the trial, the court permitted the plaintiff to give evidence of the defendant's pecuniary ability, and that he himself was a bankrupt. There was an objection to this evidence, which the court overruled, and that ruling is now assigned for error.

It is insisted, and some authorities cited tending to support the position, that evidence of the defendant's pecuniary ability is not admissible.

In Sedg. on Dam. 544, it is said: "In actions for criminal conversation, it has been held that the amount of reparation is in no sense to be measured by the defendant's property; and evidence that the defendant is a man of large fortune is, therefore, inadmissible."

Again, in Greenleaf's Ev., vol. 2, § 55: "But it seems that evidence of the defendant's property cannot be given, in chief, in order to acquire damages, the true question being, not how much the defendant is able to pay, but how much damage the plaintiff has sustained."

Both of these authors refer to the case of *James v. Biddington*, 6 Car. & P. 587.

Blackstone, in speaking of adultery or criminal conversation, says: "Considered as a civil injury (and surely there can be none greater), the law gives a satisfaction to the husband for it, by action of trespass *vi et armis*, against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as, the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction, or otherwise, of the wife, founded on her previous behavior and character, and the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious." 3 Bl. Com. 139.

Reeve, in his Dom. Rel. 64, states the nature of the injury, and the remedy, with his usual force and accuracy. "In form," he says, "this is an action of trespass *vi et armis*; but, in substance, it is an action on the case for the seduction of the wife—the alienation of her affections from the husband, and exposing him to shame, ridicule and the hazard of maintaining a spurious issue."

The principle of allowing vindictive or exemplary damages, in certain classes of injuries, is fully recognized in this State.

Grable v. Maygrave, 3 Scam. 372, was an action on the case for seducing plaintiff's daughter. The precise questions were as to the

competency of evidence as to the defendant's pecuniary ability, and that tending to show that plaintiff was a poor man. The court said: "In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrong-doer. For these purposes, proof of the condition in life, and circumstances, as well of the father and his family as of the party committing the injury, is highly proper, and should be given to the jury, and considered by them in estimating the damages."

It was held that the pecuniary ability of the defendant was a proper subject of inquiry, with a view to the question of exemplary damages, and that evidence of the poverty of the plaintiff was admissible, to show the effect of the injury upon the plaintiff, in respect to the loss of services of the daughter and payment of expenses.

McNamara v. King, 2 Gilm. 432, was trespass for assault and battery; and it was held that evidence of the pecuniary circumstances of the parties was admissible upon the same grounds as in *Grable v. Margrave*, *supra*.

Cochran v. Ammon et ux., 16 Ill. 316, was trespass for assault and battery committed upon the wife. Evidence of pecuniary circumstances of both parties was admitted, and the question was made that, inasmuch as husband and wife had sued jointly, there could be no recovery for loss of service of wife; hence, evidence as to poverty of plaintiffs could not be admitted upon the ground stated in either of the foregoing cases. But the court held that it was admissible on the ground that pain and suffering, consequent upon the injury, might be much greater where the husband was unable, from poverty, to obtain medical aid, remedies, suitable apartments and nursing, such as ample means would afford; and showing such condition tended to show the extent of the injury.

Yundt v. Hartrunft, 41 Ill. 9, was trespass *vi et armis* for seducing and debauching plaintiff's wife. There was no question made as to admissibility of evidence of pecuniary circumstances; but the court held that an instruction telling the jury if they found defendant had taken advantage of a position of confidence, and seduced plaintiff's wife, in his absence from the State, they might give exemplary damages, was right and proper.

If exemplary damages may be given in an action for the seduction of the wife, of which there is no doubt, and the plaintiff may recover

for loss of service, if he allege and prove it, we are unable to perceive any distinction, in principle, between this case and that of *Grable v. Margrave*, *supra*, in respect to evidence of pecuniary circumstances of the parties.

This case was tried some years after the injury, and evidence that the plaintiff was a bankrupt at the time of the trial, which the court permitted him to give, was not within any of the grounds upon which such evidence is admissible, and the court should have excluded it. This was error, and we think, also, that the court erred in overruling appellant's motion for a new trial. The plea of accord and satisfaction was sustained by the clear weight and preponderance of the evidence, the appellant himself being corroborated by the evidence of three disinterested witnesses, and appellee but faintly denying it.

The judgment will, for the reasons stated, be reversed and the cause remanded.

Judgment reversed.

NOTE—The general principles upon which damages were given in *Crim. Con.* in England, were laid down with great clearness by an eminent judge. He said: "The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant; his being a friend, relation, or dependent of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before the acquaintance with the defendant; and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation." *Buller's N. P. 27*. See *Mayne on Damages*, 385, wherein he argues strongly against the dictum of *ALDERSON, B.*, in *James v. Biddington*, cited in the principal case, and in favor of the proposition that general evidence of defendant's pecuniary ability may be given. — *RMP.*

Jerome v. Bigelow.

JEROME, appellant, v. BIGELOW.

(66 Ill. 452.)

Contract — illegal.

A contract by a physician to take the office of another and practice therein in the name of the other, *held*, void as against public policy.

BILL for an injunction. The opinion states the case.

Monroe, Bisbee & Gibbs, for appellant.

Sidney Smith, for appellee.

SCOTT, J. This bill was for an injunction and relief. The parties are physicians, and were practicing their profession as specialists in the city of Chicago.

The decision of the case turns upon the construction that shall be given to the contract of the 10th of May, 1870, and the supplemental agreement.

The substance of the agreement is, that appellant should take possession of the office theretofore occupied by appellee, with every thing belonging to it, and by the express terms of the contract, he was authorized and licensed to carry on and conduct the business of a doctor of medicine in the special departments thereof in which appellee had previously been engaged, in all its branches at his discretion, in the same office, in the name and under the patronage and good will of appellee, from the 10th day of July, 1870, for and during the period of ten years next thereafter, in consideration of which appellant was to pay appellee the sum of \$4,000 per annum, in semi-annual payments, until the sum of \$40,000 should have been paid.

The construction given to the contract by the counsel for appellant is, that by its terms appellant was licensed to practice medicine in the name of appellee, to personate him when applied to by patients requiring medical treatment, and to prescribe for them in his name; that he was not bound to explain to such persons that

he was not, in fact, appellee. It is said that "it was perfectly natural he should be called for and addressed" by the title of appellee. It is not denied that he was applied to by persons in need of medical assistance under the belief that he was appellee; that he represented himself to them as such and accordingly treated them.

Assuming this to be the true construction of the contract, we have no hesitation in pronouncing it contrary to public policy.

It may be that appellant is as good a physician as appellee, and quite as skillful in the treatment of disease. But that is not the question. Persons in need of medical aid are entitled to the physician of their choice, and he who personates another in that regard and thus imposes on that unfortunate class of persons, commits a great wrong. A contract that licenses and permits such practices is absolutely vicious, and a court of equity will never enforce it. It may have been, in this case, that persons living at a distance, who may have heard that appellee possessed some skill in the treatment of certain diseases, applied to him for medical advice, and would not get it, but would get that of another physician of whom they had never heard. It is a proposition too plain for argument, that through such a contract the public might be grossly imposed upon. If it were possible for an eminent physician, celebrated throughout the country for his great skill and experience in the treatment of disease, to make such a contract with an inexperienced physician, it would impose upon an unfortunate class of persons a most cruel and iniquitous deception. It would hardly be possible to conceive what sort of a contract would be more mischievous in its tendencies or cruel in its practical results.

It is immaterial what may be the relative medical attainments of these parties. The principle would be the same, whether their attainments and skill in treatment of disease were equal or unequal. No man has the right to sell his reputation or skill in any profession, whatever it may be, and thus enable an unknown party to perpetrate a fraud upon the public in his name.

This is not a case of sale of the good will of a business that can be as well transacted by one person as another; and the cases cited by counsel, supposed to be illustrative of the principles that govern such cases, can have no application. It is not possible to assimilate the case under consideration to a case of the sale of the good will of the business, and maintain it on that ground. The one is lawful and the other is unlawful.

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

The principles of the following cases, in some degree, elucidate the case at bar : *Bell v. Locke*, 8 Paige, 74 ; *Taylor v. Carpenter*, 11 id. 299 ; *Bloss & Adams v. Bloomer*, 23 Barb. 604 ; *Cornelius v. Walsh*, Breese, 98.

Both parties are equally involved in the turpitude of this transaction. The law will not assist either, but will leave them to the consequences of their own contract.

The bill was properly dismissed, and the decree is affirmed.

Decree affirmed.

CHICAGO AND ALTON RAILROAD COMPANY V. PEOPLE *ex rel.*
KOERNER.

(67 Ill. 11.)

Constitutional law — regulation of railway freights.

A State legislature has power to prohibit unjust discrimination in railway freights

An act prohibiting not only unjust discrimination, but all discrimination in railway freights, *held* in violation of the State constitution which provided for the passage of laws to prevent unjust discrimination.

It seems that the discrimination is unjust where less rates for greater distances are charged only on the ground of the existence of competing lines.

INFORMATION in the nature of *quo warranto* to have the forfeiture declared of the franchises of the Chicago and Alton Railroad Company. The opinion states the facts.

Beckwith, Ayer & Kales, and *Williams & Burr*, for appellant.

J. H. Rowell, Hamilton Spencer and *R. M. Benjamin*, for relators.

LAWRENCE, C. J. This record brings before us the proceedings upon an information in the nature of a *quo warranto*, filed by the railroad commissioners of the State against the Chicago and Alton Railroad Company, under the act which went into operation July 1, 1871, entitled "An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

this State for the transportation of freight on said roads." The information sets forth that the company, in violation of this act, had repeatedly charged and received for transporting lumber from Chicago to Lexington, a distance of one hundred and ten miles, the sum of five dollars and sixty-five cents per one thousand feet, while, at the same time, it had only charged for transportation of like lumber from Chicago to Bloomington, a distance of one hundred and twenty-six miles, the sum of five dollars per one thousand feet. The company, by way of defense, pleaded its charter, and alleged that the rates of toll from Chicago to Lexington were in fact reasonable, while the rates from Chicago to Bloomington were unreasonably low, and were established because of the competition at the latter point with the Illinois Central Railroad Company. To this plea the relators demurred. The demurrer was sustained, a judgment of ouster was pronounced against the company, and its franchise was declared forfeited. From this judgment the company has presented an appeal to the court.

The question involved in this record is the constitutionality of the act of the legislature under which the information was filed. The object of the general assembly in passing the law is indicated by its title, which we have already given. The substance of the first section of the act is, that no railroad corporation in this State shall charge a larger compensation for the transportation of freight over any distance than it is charging at the same time, for freight of the same class, over a less distance, nor shall it charge the same amount that it charges over a less distance. Another clause of the same section provides that no railroad company in this State shall charge a larger compensation for freight over any portion of its road, than is charged for freight of the same class over any other portion of equal length.

The second section of the act merely defines what is meant by the phrase "railroad corporation."

The third section makes the rates of the year 1870 the standard for freight charges. This section is not brought before us by this record.

The fourth section provides for the recovery of a penalty or one thousand dollars, in an action of debt, together with a reasonable attorney's fee, by any person aggrieved by the violation of this act.

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

The fifth and last section provides that any willful violation of this act, by any railroad corporation, "shall be deemed and taken a forfeiture of its franchises," and authorizes a proceeding to that end, such as is before us in the present record.

Very elaborate arguments have been filed by counsel, but they are chiefly devoted to a discussion of the power of the legislature to control the rate of railway charges or to fix their maximum limit. It is urged by counsel for the company that its charter is a contract with the State, by which the latter has irrevocably granted to the corporation the right to establish its rates of toll, subject only to an implied condition, which is admitted by counsel, that they shall not be unreasonable or excessive. It is further urged that this charter, with all the privileges it granted, is protected under that clause of the constitution of the United States which prohibits the States from enacting any law impairing the obligation of contracts. On the other hand, it is contended by counsel for the relators that railroad corporations which obtain their right of way through the exercise of the right of eminent domain — a right belonging only to the sovereign power of the State, and to be delegated by that power only for public purposes — must be regarded as *quasi* public corporations, and therefore subject to legislative control, so far as may be necessary for the public welfare, of which the legislature must necessarily be the judge. It is further contended that the right to control and regulate their tolls is a species of police power which the legislature cannot alienate from the State even if it should so desire, because essential to the proper sovereignty of the State.

These propositions of counsel invite us to a wide field of discussion, upon which we do not at present propose to enter. We have stated them for the purpose of saying, in terms, that we express no opinion in regard to them, and do not propose to do so until a case shall come before us demanding their discussion. There are laws upon our statute book involving their consideration, but the act before us does not necessarily do so in its application to the present case, and the expression of an opinion in regard to legislation not involved in this record would be obviously improper.

Conceding, for the purposes of this appeal, all that is claimed by counsel for the appellant in regard to the inviolability of railroad charters regarded in the light of contracts, we are still of opinion that the legislature has the clearest right to pass an act for the

purpose of preventing an unjust discrimination in railway freights, whether as between individuals or communities, and to enforce its observance by appropriate penalties. The grounds of this opinion may be briefly stated, and they are as follows :

A railroad company is chartered, and is chartered solely, for the purpose of exercising the functions and performing the duties of a common carrier. The duties and liabilities of common carriers are clearly defined by the common law, and have been so defined for centuries. In all commercial countries the law upon this subject is one of the most important branches of legal science, and its leading principles were established by the courts of England at an early day. One of these principles is, that nothing excuses the carrier for the non-delivery of the goods received by him for carriage, except the act of God, or the public enemy. We do not find it written in the charters of railroad corporations in this State, that they shall exercise their franchises subject to this stringent liability; yet, nevertheless, this court has firmly held them to it, not permitting them to evade it, even by a notice, or by any means short of a special contract with the shipper to which his free assent must be shown to have been given. Another perfectly well-settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll. In the language of Chief Justice HOLT, when delivering the opinion of the court of King's Bench, in the celebrated case of *Coggs v. Bernard*, 2 Lord Raymond, decided in 1703, the common carrier "exercises a public employment," and it necessarily follows that he must deal with the public fairly and without unjust discrimination. This common-law duty of common carriers is not prescribed in the charters of railroad corporations, but, like the other duty of delivering goods in safety, unless prevented by the act of God or the public enemy, it attaches to them by virtue of their function as common carriers, the moment they commence the transportation of freight. In accepting their charters, which gave them an artificial existence as common carriers, they necessarily accepted them with all the duties and liabilities attached, by the existing law, to the function of a common carrier. This proposition seems to our mind so plain as hardly to admit of more argument than an axiom in mathematics. While the law now imposes, and always has imposed, upon individuals exercising the vocation of a common carrier, the obligation

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

of rendering service to all persons without injustice to any, how utterly unreasonable it is to claim that a corporation is to be permitted to discriminate in its tolls at its own discretion and without regard to justice, merely because the legislature in the charter that created it, for the purpose of exercising a like vocation, has authorized it to establish rates of toll, without, in terms, providing that they shall be free from unjust discrimination. What was the import of that grant, made, as it was, in broad and general terms? Clearly nothing more than that the corporation should have the same right of establishing tolls that a natural person has, when acting as a common carrier—a right to be exercised within the same limitations that the common law, in behalf of justice and public policy, imposes upon the natural man.

This case has been argued on both sides with commendable ability and candor, and we avail ourselves of an admission made by counsel for the company to illustrate the position we are enforcing. It is conceded by counsel, in express terms, that “a natural person is not allowed to make unreasonable and excessive charges as a common carrier, and an artificial person is subject to the same restrictions.” It is, of course, contended by counsel, that the legislature has no power to determine what charges are reasonable or unreasonable, but with that branch of the question we have, in this case, no concern. It is undoubtedly true, as conceded by counsel, that the artificial person has no more right than the natural person to make unreasonable and excessive charges as a common carrier. And why? This restriction is not found in railway charters as generally framed, and certainly not in the charter presented by this record, in regard to which counsel are speaking. The obvious reason is, the principle we have already stated. The rule forbidding unreasonable charges was a common-law rule when these charters were granted, and the companies accepted their charters with this implied limitation upon the power granted, in general terms, to establish their rates of freight. If this implied condition against unreasonable rates of freight attached by the existing law to their charters at the date of their acceptance, on what ground can it be held that the corresponding condition against unjust discrimination did not equally attach? There is no ground for the distinction. The charters were granted for the purpose of furnishing improved means of transportation and travel to all persons alike, without unjust discrimination between individuals or communities.

and they were accepted with the knowledge that the nature of the grant imposed that obligation.

This question of unjust discrimination is not before this court for the first time. In the case of *Vincent* against this same company, 49 Ill. 33, we held that railway companies can make no injurious discrimination between individuals, and therefore could not charge one rate for delivering grain at a certain elevator in Chicago, and a higher rate for delivering at another elevator in the same city, and equally accessible upon its line. The same rule was recognized in *The People v. C. and A. R. R. Co.*, 55 Ill. 111, though the facts of that case were found not to require its application. The rule was again declared in *C. and N. W. R. R. Co. v. The People ex rel. Hempstead et al.*, 56 Ill. 365. The opinion in that case cites several English and American cases in which it was held that railway companies could not be permitted to practice an injurious and arbitrary discrimination between different persons, and we now refer to them without further citation.

If, then, an unjust discrimination is not to be permitted as between individuals in regard to freights, is it any more permissible as between different communities or localities? We are wholly at a loss to discover the slightest difference in reason or principle. If a farmer, living three miles from the Springfield station upon this company's road, is charged fifteen cents per bushel for shipping his corn to Chicago, is it just that the farmer who lives twenty miles nearer Chicago should be charged a higher sum? Certainly not, unless the railway company can show a peculiar state of affairs to justify the discrimination, and this must be something more than the mere fact that there are competing lines at one point and not at the other. The discrimination, in such a case, is as much a discrimination between individuals as it would be in reference to two persons living in the same locality, and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of shipment, and such a reason, in the case supposed, it is not very easy to conceive.

So, too, in the case before us. The resident of Bloomington, who sends to Chicago for a car of lumber, is charged by the company at the rate of five dollars per thousand feet for transportation. The resident of Lexington, who orders the same lumber at the same time, is charged five dollars and sixty-five cents per thousand feet

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

for a transportation sixteen miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town?

We have endeavored to show on what a firm foundation rests the constitutional power of the legislature to prohibit unjust discrimination in railway freights, even conceding what is claimed for their charters as contracts.

We should, however, be doing the counsel for appellant an injustice, if it were to be inferred, from what we have said, that they distinctly assert a right, on the part of the company, to make unjust discriminations. We understand them to concede, in the conclusion of their argument, the power of the legislature to prohibit such discriminations, but they insist that no discrimination is unjust if the person against whom it is made is not himself charged an unreasonable rate. They therefore averred, in their plea to the information, that the charges for freight to Lexington were, in fact, reasonable, and those to Bloomington were unreasonably low. But in our opinion, if the act of the legislature had directed its penalties, as it should have done, not against all discriminations, but only against unjust discriminations, and had made *that* the issue to be tried, it would have been no answer to aver, in the plea, that the larger rates for the less distance were reasonable rates. That would have had only an argumentative bearing upon the issue to be tried, to wit: the existence of an unjust discrimination between neighboring towns. What is a reasonable rate of freight over a railroad, is at best a mere matter of opinion, depending on a great variety of complicated facts, which but few persons could intelligently investigate, and which it would be wholly in the power of the company to furnish or withhold. Railroad experts might be produced who would testify that, in their opinion, the rate to Lexington, in the present case, was a reasonable rate, but the fact that a less rate was charged for the greater distance to Bloomington, if the difference was a permanently established and not a casual difference, and if it could be explained only by the fact that there was a competing line at one place and not at the other, might be well accepted as conclusive proof that the rate to Lexington was not a reasonable rate. The only issue to be made under a law properly framed would be, whether there was an unjust discrimination or not. If, on the trial

of such an issue, the prosecutor proves a permanently established discrimination, like that disclosed by the present record, and the company can show no other reason for it than the existence of a competing line at the favored point, the defense must be held unsatisfactory, notwithstanding witnesses may testify that they believe, as a matter of theoretical opinion, that the rates to Lexington are reasonable. They cannot be reasonable, and the discrimination must be unjust, if the lesser rates for the greater distance have been established merely because the company has ceased to exercise at that point a practical monopoly. It cannot be supposed that either of the competing lines would establish a permanent rate of charges upon a scale that would not furnish a remunerative profit. The rates to Bloomington would be established under the influence of a fair competition, which, by the ordinary laws that govern commerce, might be relied upon as establishing a rate not unreasonably low. At Lexington, the rates would be established by the uncontrolled discretion of the company, and it should not cause surprise if they were fixed unreasonably high. If the rates are not unreasonably low at Bloomington, they are unreasonably high at Lexington. If they are unreasonably low at Bloomington and at all other points touched by competing lines, is it not certain that the company will indemnify itself by charging, at the stations where there is no competition, a rate unreasonably high? And will not a discrimination arising solely from such a cause be necessarily an unjust and injurious discrimination as to all persons shipping or receiving freights at the non-competing stations? If Lexington is a town where a considerable business is done, it is evident that this discrimination of rates, if permanently established, will diminish its business and check its growth. It was never intended or expected that these corporations should use their power to benefit particular individuals or build up particular localities by arbitrary discriminations in their favor that must cause injury to other persons or places engaged in rival pursuits or occupying rival positions. It is in vain to say, in defense of such discriminations, made without just cause, that the rate of charges against the injured person or locality is a reasonable rate, and therefore no injury is done. An injury, as a matter of fact, is committed in the manner just suggested, and the legislature has the right to require the corporation to show a sufficient cause for the discrimination which produces the injury, and it cannot be permitted to evade the issue

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

by raising the speculative inquiry as to whether the rates charged against the injured parties or localities are not, after all, reasonable rates. Even if reasonable, when regarded in reference to the profit upon the capital invested in the road, they are not reasonable, in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or for greater services rendered to persons doing business with the company at neighboring stations.

From what we have said, it will be seen that the object of the law under which these proceedings were instituted was, in our opinion, clearly within the power of the legislature. The law was intended to prescribe the methods by which to enforce a common-law duty that the railways of the State voluntarily assume whenever they exercise the functions of a common carrier, and it is, in no respect, a violation of their charters.

It remains to be considered whether there are defects in the details of the law which need to be amended, before it can be executed. We are of opinion that there are such defects, but they are susceptible of easy amendment.

The discrimination forbidden by the common law to common carriers is an unjust or unreasonable discrimination. The provision in our new constitution is also against unjust discrimination. It is in the following words :

“The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different roads in the State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises.” Art. XI, § 15.

This provision, expressly directing the legislature to pass laws to prevent *unjust* discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and, by implication, it restrains the power of the legislature to a prohibition of those which are unjust. That was undoubtedly the object of the legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just or unjust, in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a

Chicago and Alton Railroad Co. v. People ex rel. Koerner.

case against the railway companies, which they are not allowed to meet by evidence showing the reason or propriety of the discrimination, and then, upon this sort of *ex parte* trial, imposes, as a penalty for the offense, a forfeiture of the franchise, which would often be equivalent to a fine of millions of dollars. The object of the law is commendable, but such a proceeding, to be followed by such a penalty for the first offense, cannot be sustained. It could only have been authorized through the inadvertence of the legislature. The law, as it now stands, makes an offense out of an act which might be shown not to be an offense, but an exercise of a wise discretion, really beneficial to the people of the State, and, while debarring the companies from all right of explanation, confiscates their franchises upon the first convictions. The legislature cannot raise a conclusive presumption of guilt against a natural person from an act that may be innocent in itself, taking from him the privilege of showing the actual innocence or propriety of the act, and confiscating his property as a penalty for the supposed offense. Those provisions of our constitution which forbid the deprivation of life, liberty or property, except by due process of law, and which guarantee the right of trial by jury "as heretofore enjoyed," and the right in all criminal prosecutions to appear and defend in person and by counsel, would all be violated by such a law. These provisions, it is true, are designed to apply only to natural persons, but artificial persons must be permitted to invoke the spirit of justice which prompted them, so far as may be necessary to protect their property and franchises against the operation of a law that substantially condemns without a trial.

That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance, than it is charging for the same distance over another part of its road, or in the opposite direction, is not, of itself, conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration. Take, for instance, the road of the appellant, with one terminus at Chicago and the other at East St. Louis. At one season of the year more freights are moving from Chicago toward East St. Louis than in the opposite direction. The consequence, of course, is, that the supply of empty cars at the latter point will be in excess of the demand. There is a water route between these points which also touches several intermediate stations upon the road. Now, unless the railway company is permitted, under such

Chicago and Alton Railroad Co. v. People ex rel. Keerner.

circumstances, to induce shipments over its line by lowering its freights, it is evident that a portion of its cars will return empty. This would, of course, necessitate a higher charge for freight moving toward St. Louis than it would be necessary to impose if return freights could be secured by lowering the rates on the return trip. To forbid the company to lower the rates of return freight would thus benefit no one, and would work an injury both to the company and to the people along the line. At other seasons of the year the larger amount of freights is moving in the opposite direction, and then the operation must be reversed.

We give this illustration for the purpose of showing that a difference of price for the same distance of transportation is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt, as a conclusive presumption, from the mere fact of difference of rates, without permitting the companies to show why the different rates were adopted.

We may so far take judicial notice of the course of public affairs in this State as to say that the real abuse which the legislature was endeavoring, by this act, to prevent, was not such proper discriminations as those we have just been supposing, but the practice, which had become general among the railways, of charging a higher compensation for carrying the agricultural products of the State to market when shipped at a station where there was no competing line, than when shipped where there was such competition, although the distance over which the freight was carried in the latter case might greatly exceed the distance in the former. The same system also prevailed in regard to the freight from Chicago to points in the interior, although probably not felt to be so great an evil. For discriminations of this character, when adopted as a system, we can certainly perceive neither justification nor excuse, but, nevertheless, it is the right of a company, when prosecuted on the ground of unjust discrimination, to offer what evidence it can by way of explanation. It might, for example, show in the present case, that the lumber shipped to Lexington had caused a greater expense in loading or unloading than that shipped to Bloomington. This may not be a very probable defense, but defenses may, nevertheless, exist, and if they do, the companies should not be deprived of the right to make them.

Before this act can be enforced, it should be so amended as to correspond with the requirement of the constitution by directing its

prohibitions against *unjust* discriminations. It should make the charging of a greater compensation for a less distance, or for the same distance, merely *prima facie* evidence of unjust discrimination, instead of conclusive evidence, as it now is, and it should give to the railway companies the right of trial by jury, not only on the fact of discrimination, but upon the issue whether such discrimination is just or not.

There is another feature in this law to which we deem it our duty to advert. As the act now stands, a forfeiture of all franchises is the only penalty that can be imposed upon a company, in a prosecution instituted on behalf of the people, and it is imposed for the first offense. This, as already remarked, in some cases would amount to a fine of millions of dollars. Is not this a violation of the spirit of that constitutional provision which says, in terms, that "all penalties shall be proportioned to the nature of the offense?" Is it not also a violation of the spirit of the very clause of the constitution under which this act was framed, and which requires the legislature to pass laws to prevent unjust discrimination and extortion by railroad corporations, "and enforce such laws by adequate penalties, to the extent, *if necessary for that purpose*, of forfeiture of their property and franchises." Would it not be better to enforce the law by a series of considerable and increasing fines, before imposing the final penalty of forfeiture? A law admitting of but one penalty, and that of the harshest possible character, will necessarily be subjected by the courts to close criticism and a strict construction.

The English Parliament passed a law, in 1854, prohibiting the giving of undue or unreasonable preferences or advantages by railway companies in the management of their business. Under this act, various cases have arisen in the English courts, which have been cited by counsel. It is unnecessary to comment upon them. They hold, as we do, that a discrimination is not necessarily an unjust discrimination. That is to be determined upon the evidence.

The opinion of the court is, that while the legislature has an unquestionable power to prohibit unjust discrimination in railway freights, no prosecution can be maintained under the existing act until amended, because it does not prohibit unjust discrimination merely, but discrimination of any character, and because it does not allow the companies to explain the reason of the discrimination, but forfeits their franchise upon an arbitrary and conclusive pre-

Toledo, Wabash and Western Railway Co. v. City of Jacksonville.

sumption of guilt, to be drawn from the proof of an act that might be shown to be perfectly innocent. In these particulars the existing act violates the spirit of the constitution.

The judgment of the Circuit Court, ousting the appellant of its franchises, must, therefore, be reversed.

Judgment reversed.

TOLEDO, WABASH AND WESTERN RAILWAY COMPANY v. CITY
OF JACKSONVILLE.

(97 Ill. 37.)

City ordinance, validity of — flagmen at railroad crossing.

A city ordinance required a railroad company to keep a flagman by day, and a red lantern by night at a point where its track crossed a street. *Held*, that the requirement was not reasonable, the crossing being an ordinary one, and not unusually dangerous. Whether such a requirement is within the constitutional limitations in the exercise of the police power is a question for the courts to decide.

ACTION against a railroad company for the violation of a city ordinance. The opinion states the case.

William H. Barnes, for appellant.

Edward Dunn, for appellee.

SCOTT, J. This action was brought to recover a penalty for a failure to comply with an ordinance of the city which required the railroad company to keep a flagman by day and a red lantern by night at the point where its track crosses the street or State road just west of the bridge known as "Rock Bridge."

It is stipulated that the company did not keep a flagman at the crossing indicated; that it is within the bounds of the city; that it is an important crossing, and much used; that it has been so used by the railroad and the inhabitants for the last twenty-five years, and that, by resolution of the city council, the company is not required, at this point, to run its trains at a rate of speed not greater than eight miles per hour, as required by general ordinance.

Toledo, Wabash and Western Railway Co. v. City of Jacksonville.

The charter of the city contains the usual grants of power to pass such ordinances as may be deemed necessary for the good government of the city, to control streets and alleys, to declare what shall be deemed a nuisance and abate the same, and to control the laying of railroad tracks in the streets and alleys. It contains no express grant of power to pass the ordinance in question. The right to do so is claimed under the police power of the municipality.

Waiving the question of the power of the city to pass the ordinance without being expressly authorized by the general assembly, we shall treat the case as though the city had the right, by the grants in its charter, to exercise all the power in the regulation of its domestic affairs that the State could do for the general welfare of the people.

There can be no question that railway corporations are subject to police regulations as well as private citizens. The general assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. The exercise of this right in no manner interferes with or impairs the powers conferred by their acts of incorporation. *The G. and O. U. R. R. Co. v. Loomis*, 13 Ill. 548; *Thorpe v. Rutland and Burlington R. R.*, 27 Vt. 140.

Under this power, it has been held that the legislature may require railroad corporations, notwithstanding no such right has been reserved in the charters, to fence their tracks, to put in cattle-guards, to place upon their engines a bell, and to do many other things for the protection of life and property. This power is inherent in the State, and it cannot part irrevocably with its control over that which is for the health, safety and welfare of society.

But such regulations must be what they purport to be, police regulations, and must be reasonable when applied to corporations or individuals. What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise the right to enact such laws.

Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the general assembly, under the pretense of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harm-

Toledo, Wabash and Western Railway Co. v. City of Jacksonville.

less in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void.

It seems to us that the ordinance in this case imposes an unreasonable burden upon the railroad company. There is but a single track, so far as the record discloses, at the point where it requires the services of a flagman, and only the usual trains of the company pass over it. It is totally unlike a place where a number of tracks cross a public street upon which there is a great amount of travel, where trains are made up, and where the trains and locomotives doing the work pass and re-pass each other at short intervals. The frequency with which trains pass and re-pass at such places renders the dangers to be apprehended constantly imminent, and the legislature may so declare and make it obligatory on the company to adopt measures to secure the public safety. The rights of the company and the public to the use of the crossing are mutual, but it is the duty of the company to provide the proper safeguards, and the degree of diligence must be in proportion to the hazard. A regulation that would require the company to place a flagman at such a place, or at any place where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one, and could unquestionably be enforced. There can be no necessity, however, for the services of a flagman at a crossing of a public highway, in the country, where there is but little travel. There it will be a sufficient protection if the company shall be required to erect signs that will notify persons that they are approaching a railroad crossing, and to give the usual signals. It is then the duty of the citizen to exercise a reasonable precaution for the safety of himself and his property.

It would hardly be insisted a regulation that would compel a railway company to maintain a flagman at every crossing of a public road or street on its entire line would be demanded by the public exigencies, or be within the constitutional exercise of the police power of the State. It is a matter of which we may take judicial notice, there does not now exist a necessity to enforce in this State many of those rigid regulations that have been adopted on some of the English railways, and in some of the densely populated countries on the continent of Europe. Doubtless, as the population increases and the dangers multiply, it will become necessary, in this

country, to increase precautionary measures for the public safety, and the companies will be compelled to bear the additional burden made necessary by the hazardous business in which they are engaged. It is their work that renders public crossings dangerous, and hence it is they may be compelled to bear the expenses of such measures as may be adopted to secure the lives and property of those who have an equal right with them to the use of the crossing on the highway.

There is nothing at the crossing where the company is required, by the provisions of the ordinance in the case at bar, to keep a flagman, that makes it unusually dangerous. So far as we know, it is an ordinary crossing. There is but a single track, on which only the usual trains pass at regular and irregular intervals and distant apart. The city has not even deemed it advisable to require the company to slacken the speed of its trains when passing this point, as it is compelled to do by ordinance when crossing other streets in the city. If the company can be compelled to maintain a flagman at this point, there is no reason why it could not be compelled to keep one at every road and street-crossing on its entire line. That there are places where the dangers to be apprehended is so constant and imminent, by reason of the construction of the passage-way over the track, the company may be required to employ a flagman to warn persons of the danger and conduct them across, we entertain no doubt, but the point designated in this ordinance is not such a one, at least it does not appear to be so from the ordinance itself, or from any thing in the record.

The conclusion that we have reached is, that the ordinance under which it was sought to compel the railroad company to maintain a flagman at the point designated is not a reasonable requirement, and is, therefore, within the constitutional limitations on the exercise of the police power.

The judgment of the court below finding appellant guilty is contrary to law, and must be reversed.

Judgment reversed.

PAXTON, appellant, v. BOYER.

(97 Ill. 122.)

Assault and battery — when justifiable — unintentional injury.

Defendant and plaintiff's brother were in conflict when defendant struck plaintiff with a knife, supposing him to be the brother. Plaintiff had in fact given no provocation for the blow. The jury found for plaintiff and assessed his damages; but also found a special verdict "that the blow complained of was struck by defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense." *Held*, that the judgment should have been for defendant on the special verdict.

A person is not liable for an unintentional injury resulting from the exercise of his right of self-defense, where neither negligence or folly is proved against him.

ACTION for an assault and battery. It appeared that defendant and plaintiff's brother were in conflict, and defendant was knocked down. On rising he struck plaintiff with a knife, supposing it was the brother. The jury found as follows:

"We, the jury, find the defendant guilty, and assess the plaintiff's damages at \$450. We, the jury, find, from the evidence, that the blow complained of was struck by the defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense."

R. N. Bishop, for appellant.

James A. Eads, for appellee.

BRESE, J. This is an action of trespass, assault and battery, and verdict for the plaintiff for \$450 damages. The jury further found this special verdict: That, from the evidence, the blow complained of was struck by the defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense. This verdict was found under the instruction of the court, that the jury might, in addition to a general verdict, find a special verdict embracing this proposition, or its converse, as permitted by the act of February 22, 1872, § 51.

The testimony shows the trespass was committed by the defendant against an unoffending party — against one who had given no cause or provocation of any kind.

The defendant asked this instruction, which was refused:

“The defendant cannot be found guilty, in an action of this kind, unless, in inflicting the injury complained of, he has been guilty of some wrong, evil intent or want of care; and if you find, from the evidence, he struck the blow without any fault, you will find for the defendant.”

On coming in of the verdict, the defendant moved for judgment on the special verdict, which the court denied. This is the first point made by appellant. He insists judgment should have been rendered for the defendant upon the special verdict, as that ignores malice and unlawful intent, and finds that the act was done under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense.

Appellant's theory is, that he mistook plaintiff for his brother, with whom he was in conflict, and who had felled him to the floor by violence.

The court, for the plaintiff, instructed the jury that it was no defense, so far as actual damages are concerned, that the defendant had been violently assaulted by persons other than the plaintiff, or was then being assaulted by such other persons, or that he may have honestly believed he was striking Peter Boyer when he struck the plaintiff, or that he may have honestly believed it was necessary for his self-defense to assault the plaintiff, if the jury find, from the evidence, that the plaintiff was not a party to such assault upon the defendant; such evidence of mistake of facts, or good intentions on the part of the defendant, can only be considered in this case by the jury as a defense against the infliction by the jury of vindictive damages, and not as a defense against such actual damages as the evidence may show the plaintiff has suffered from such assault, or as naturally resulted from such assault.

These instructions involve the merits of this controversy.

Appellant relies, in support of his theory, upon *Morris v. Platt*, 32 Conn. 75, and *Brown v Kendall*, 6 Oush. 292. These cases are fully discussed, and sustain appellant. The facts in both cases are similar to those in this case, and were actions of assault and battery. The principle is announced in those cases, that a person is not liable for an unintentional injury resulting from a lawful act,

Paxton v. Boyer.

where neither negligence nor folly is imputable to him who does the act, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff.

This cause was tried on the general issue, with leave to give all matters in evidence which could be specially pleaded. That the plea of self-defense could have been pleaded is not questioned; in fact, the plaintiff, in his second instruction, so put it to the jury, and they, by their special finding, have said the act was done in necessary self-defense, or under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense. This finding was not excepted to by the plaintiff, nor did he object that the jury should be instructed on that point. It, therefore, stands as the verdict of the jury, that there was no malice in the act, and that it was done in necessary self-defense. This brings the case within those relied on by appellant, *supra*.

Can it be a question that, for an act done under such circumstances, the party doing the act is liable either *civiliter* or *crimin- aliter*? The rule is well established that, in an action of assault and battery, the plaintiff must be prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault. 2 Greenl. on Ev., § 85.

The jury, by their special finding, have ignored the unlawful intention, and have said the defendant was not in fault. On what principle, then, can he be made chargeable? If a person, doing a lawful act in a lawful manner, with all due care and circumspection, happens to kill another, without any intention of doing so, he is not liable criminally. How, then, can it be said he shall be responsible in a civil case, when, in doing a lawful act with due care, and an injury happens, he shall be deemed in fault, and mulcted in damages?

It is said by appellee the rule is different in civil cases; that the motive (quoting from Chitty), intent or design of the wrong-doer toward the plaintiff is not the criterion as to the form of the remedy, for when the act occasioning the injury is unlawful, the intent of the wrong-doer is immaterial; but appellant here is no wrong-doer, as the jury have said by the special verdict.

We do not deny the principle contended for by appellee, that, where a tort is done, intention is no element to be considered. The special verdict out of the way, we should not have much difficulty in coming to the conclusion appellee's counsel have reached, but,

Toledo, Wabash and Western Railway Co. v. Grush.

with that at the threshold of the case, we are unable to see the force of them.

The authority cited from 2 Greenl. Ev., § 94, by appellee, keeping the special verdict all the time in view, is decisive of the question. It finds, substantially, appellant "free from fault," and therefore not reasonable.

The special finding must override the general verdict, because both cannot stand, there being such an irreconcilable antagonism, and this is the provision of section 51, *supra*. It may be answered to the argument of appellee, that he was assaulted while in the enjoyment of a legal right which he had not forfeited by any act of his; that the jury have found the act done by appellant was done in the exercise of his legal right, without any design to injure appellee.

We have thought much on this case, and are constrained to hold, on the authority of *Morris v. Platt*, and *Brown v. Kendall*, *supra*, and on principle, that judgment should have been pronounced for the defendant on the special verdict, for that justified him. This renders it unnecessary to consider any other question made on the record.

The judgment must be reversed, and the cause remanded, with directions to enter judgment for the defendant on the special verdict.

Judgment reversed.

TOLEDO, WABASH AND WESTERN RAILWAY COMPANY V. GRUSH.

(97 ILL. 282.)

Injury to person not a passenger by defects in railroad platform.

A person not a passenger, but lawfully on a railroad platform, may recover for injuries received by accidentally stepping through a hole, negligently left in the platform by the company's agent.

Plaintiff lawfully entered upon a railroad platform to look for certain freight belonging to his employer. He accidentally stepped through a hole in the platform, which had existed for two years, and of which the company's agent was aware. *Held*, that there was evidence from which a jury might find a verdict for plaintiff.

Toledo, Wabash and Western Railway Co. v. Grush.

ACTION against a railroad company for personal injury caused by defects in a platform. The opinion states the facts. A verdict and judgment of \$1,000 were rendered for plaintiff, whereupon defendant appealed.

Nelson & Roby, for appellant.

Eden & Odor, for appellee.

MCALLISTER, J. This was an action on the case, brought by appellee in the Macon Circuit Court, against appellant, to recover for an injury received by the former, in stepping through a hole in the platform of appellant's railroad station. Appellee recovered in the court below, and the only question made upon this appeal is, as to the sufficiency of the evidence.

This case is not like that of *Gillis v. Pennsylvania R. R. Co.*, 59 Penn. St. 129, cited by appellant's counsel. That was a case where the plaintiff went upon the platform from mere curiosity and was injured by its fall. It was held, that not being upon the platform lawfully, as a passenger, or for the transaction of business, he could not recover.

In the case under consideration, the plaintiff lawfully entered upon the platform, by the direction of his employer, to see that certain freight belonging to the latter, and which had arrived at the station by appellant's road, was properly taken care of, and while upon the platform, between five and six o'clock, P. M., for that purpose, and looking for the agent, he accidentally stepped through a hole in the platform, causing a severe internal injury, most satisfactorily established by the evidence.

He being lawfully there, and free from negligence, the only question remaining is, whether the circumstances would imply negligence on the part of appellant or his servants.

The obligation of care on the part of a railroad company extends to all the accessories of its business, among which are stations or depots. These must be constructed and arranged with care, properly lighted when dark, and otherwise made safe and convenient for persons lawfully entering therein for the transaction of business. But in these, as in other matters, the company is only bound to use ordinary care, except in favor of passengers. *Shearm. & Redf. on Neg.*, § 447. The record contains evidence tending to show that

 Illinois Mutual Insurance Co. v. Andes Insurance Co.

the defect in the floor of the platform, where appellee was injured, had existed for nearly two years, and was known to the agent of appellant having charge during that time. It was occasioned by the decay of a plank, and exhibiting a hole for the length of time stated.

The law was given by the court to the jury quite as favorably for the appellant as it was entitled. It is not a strong or clear case upon the evidence, yet the verdict is not wholly unsupported by the evidence, nor is it so manifestly against its weight as to bring the case within the rules of this court as to setting verdicts aside.

The judgment will therefore be affirmed.

Judgment affirmed.

 ILLINOIS MUTUAL INSURANCE COMPANY V. ANDES INSURANCE CO.

(97 Ill. 302.)

Fire Insurance — re-insurance — apportionment of loss.

Plaintiff insured goods for \$6,000 and effected a re-insurance with defendant for \$2,000, the policy of re-insurance providing that the loss should be payable "*pro rata* at the same time and in the same manner as the re-insured company." A loss happened, for which plaintiff paid \$600 in full discharge of liability. *Held*, that plaintiff could only recover \$200 of defendant.

ACTION on a policy of fire insurance. The opinion states the facts.

Charles P. Wise, for plaintiff in error.

Stuart, Edwards & Brown and *J. H. Yager*, for defendant in error.

SHELDON, J. The only question here presented for decision is, as to the amount of the recovery.

The original insurer became *liable* to pay to the first assured the sum of \$6,000 in consequence of the loss of the subject-matter of the first insurance; but it *actually paid* only \$600 in full discharge

Illinois Mutual Insurance Co. v. Andes Insurance Co.

of the liability. The amount of the re-insurance was \$2,000. Shall the re-insured recover the full \$2,000, or only \$600, or a *pro rata* part of the latter sum?

So far as we are aware, the contract of insurance, or of re-insurance, against loss by fire, has uniformly been held to be a contract of indemnity not exceeding the sum insured.

In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, not the measure of the assured's claim. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled where it is less than the sum insured. So, if the assured has parted with all his interest in the subject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for an indemnity, and he has sustained no loss or damage.

Although the original insurer here did become liable to pay the sum of \$6,000, that did not turn out to be the amount of its actual loss. The actual loss and damage which it sustained was \$600, the sum which it paid in full discharge of its liability. That sum, given to the re-insured, would make good the loss sustained by reason of the original insurance; whereas, to allow a recovery of \$2,000, would enable it to realize a gain of \$1,400 over and above the actual damage it has sustained. It is difficult to see how this can be done consistently with principle, under a contract which, we apprehend, this must be admitted to be, to indemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance.

In *Bainbridge v. Nelson*, 10 East, 346, it was said by BAYLEY, J.: "A policy of insurance is only a contract of indemnity, and any thing which tends to show that an assured can recover beyond his indemnity, is against the very principle of the contract."

Of like import was the language of Lord MANSFIELD, in *Hamilton v. Mendes*, 2 Burr. 1210, in reference to an action on a policy of insurance, as follows: "The plaintiff's demand is for an *indemnity*; his action, then, must be founded upon the nature of the *damnification* as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the court has decided that the *damnification*, in truth, is an average, or perhaps no loss at all." "Whatever undoes the *damnification* in the whole, or in part, must operate upon the

indemnity *in the same degree*. It is a contradiction, in terms, to bring an action for *indemnity* where, upon the whole event, *no damage* has been sustained."

The precise point here involved is quite barren of the authority of adjudged cases. As the contract of re-insurance was virtually prohibited in England more than a century ago — it having been there forbidden except where the insurer shall be insolvent, become bankrupt or die, by the statute (19 Geo. 2, ch. 37, § 4) — that may account for the absence of authority in the English reports upon the point.

What little authority is to be found, it must be confessed, is in support of the view that, where the first insurer becomes insolvent, and, on a compromise with his creditors, pays only a certain percentage of the loss sustained by the insured, the re-insurer is, nevertheless, bound to pay the re-insured the full amount of the re-insurance. Such was the decision of a French court of admiralty at Marseilles, made in 1748.

In *Howe v. Mutual Safety Insurance Co.*, 1 Sandf. 137, this subject is quite elaborately considered, and the authorities bearing upon it adduced, and the doctrine laid down by the above French decision is recognized and adopted as the true rule of law which governs the extent of the liability of a re-insurer.

There are treatises on insurance where the same doctrine may be found to be laid down, but, so far as they have for its support the authority of adjudications, they seem to depend upon the two cases above cited.

In *Eagle Insurance Co. v. The Lafayette Insurance Co.*, 9 Ind. 443, the case in 1 Sandf. is, with seeming reluctance, barely recognized as authority.

This comprises the sum of the authority of adjudged cases to which we have been referred, or which have been brought to our notice in support of this doctrine of the re-insurer's liability for the full amount re-insured, as contended for by the appellee.

We can understand how the re-insured party, where the amount of his liability has been ascertained, may be admitted to recover to the full extent of the liability, so long as the liability to pay continues, although he may not have made payment, or may be insolvent and unable to pay. But where the liability has become actually discharged by the payment of a sum less in amount, it is difficult to perceive, on principle, why the sum paid in discharge

Illinois Mutual Insurance Co. v. Andes Insurance Co.

of the liability should not be taken as the amount of damage sustained, and as the measure of indemnity to be recovered under a contract which is confessedly one of indemnity.

Notwithstanding, then, the adverse authority that is to be found, we are disposed to hold, on principle, as we regard it, that \$600, the sum paid by the re-insured company in discharge of its liability for \$6,000, was the actual loss it sustained, and the extent of the recovery which should be had. And in view of the following special clause in this policy of re-insurance, we are of opinion that the recovery in this case should be reduced even below that sum. The clause is this: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the re-insured company."

The only construction we can well put on this clause, and give it practical effect, is this: that the Andes Insurance Company, the re-insurer, was only to pay at the same rate as the Illinois Mutual Fire Insurance Company, the re-insured, should pay, and as the latter company paid only ten cents on the dollar of its insurance, the former company is only liable to pay at the same rate—that is ten cents on the dollar of the amount of its re-insurance, which would be \$200.

Appellee's counsel suggest that the clause has reference only to cases of *double* insurance. There is no warrant in the language of the clause for giving it such a reference.

The policy of re-insurance is not before us. The case comes before us as a certified question of law, and this clause is the only portion of the policy which is put into the case, so that we have nothing, aside from the language, itself, of the clause, to aid in its construction.

We are of the opinion the judgment should have been for \$200 instead of \$2,000.

The judgment is reversed and the cause remanded.

Judgment reversed.

Indianapolis, Bloomington and Western Railroad Company v. Hartley.

INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILROAD COMPANY
v. HARTLEY.

(97 IL. 439.)

Railroad in street — rights of adjoining owner.

Although the fee of a street is in the adjoining owner, a municipal corporation may grant the right to a railroad company to lay its track in the street; but the company is liable to the adjoining owner for injuries to his premises sustained thereby.*

ACTION of trespass against a railroad company for laying down its tracks and making excavations in a street in which plaintiffs claimed the fee. A verdict and judgment were rendered for plaintiffs for \$1,800. The opinion states the case.

Weldon & Benjamin and *J. C. Black*, for appellant.

M. W. Packard and *H. Spencer*, for appellees.

SCOTT, J. The land upon which the alleged trespasses were committed was never platted or laid off as a part of or of any addition to the city of Bloomington, but is within its corporate limits, and was so situated at the committing of the grievances complained of in the declaration.

Prior to the extension of the city limits a public highway, known as the "Peoria road," had been established on the south side of the premises in controversy, of the width of sixty feet, one-half being on the land now owned by the appellees. After the limits of the city had been extended so as to include this tract of land, which was done some fifteen or twenty years ago, the highway over which the public had exercised jurisdiction for so many years, at that point, was called Front street, being a continuation, by common consent, of a street of that name to the western boundary of the city, and by dedication, or common user, it was made fourteen feet wider than the old road, but whether any portion of the fourteen feet came off the premises owned by appellees does not very clearly appear,

* See *Hobart v. The Milwaukee City Railroad Co.*, 9 Am. Rep. 461 and note.

Indianapolis, Bloomington and Western Railroad Company v. Hartley.

nor is it very material. The city neither purchased nor condemned the additional number of feet added to the street. There was no ordinance formally extending Front street westward, but the city assumed and continued to exercise jurisdiction over the highway as a street the same as other streets in the city.

Under the authority given by the city, by ordinance, to lay the track upon and across any street or alley within certain limits, appellant constructed its road diagonally across Front street, south of appellees' premises, without their consent. In constructing the road-bed appellants caused the street to be excavated to the depth of four or five feet. The track nowhere touches the land in the inclosure of appellees, but comes within six inches or a foot of it at one corner, and if they own to the center of the old highway, then it is constructed on land the fee of which is in them.

The excavation in the street made it necessary to lower the grade in front of the premises of appellees, and in doing so the company removed a large amount of earth. This latter work appears to have been done by the company under the direction of the street commissioner, so as to have an even grade on which the public travel could more conveniently pass over the track.

The premises of appellees had previously been above the grade of what is called Front street, but the construction of the company's road across the street, and the grading that was necessary to be done to get an even grade, left them still very much higher, and rendered ingress and egress more difficult for carriages and even for persons on foot.

It cannot be successfully contested that appellees owned the fee of the land to the center of the old highway. It was never conveyed to the city by any formal grant, by plat or otherwise. The adjoining proprietors never parted with the fee. Had they platted the grounds into lots and streets, under the statute the plat itself, when recorded, would have operated as a grant of the fee to the corporation. This they did not do. The city could and did acquire an interest in the street, although the grounds were never set apart for that specific purpose, in the manner prescribed in the statute. It may be by dedication, or common user, and in such cases the fee would remain in the original proprietors, burdened with a public easement. *Canal Trustees v. Haven*, 11 Ill. 554; *Hunter v. Middleton*, 13 id. 54; *Manly v. Gibson*, id. 308.

It is not questioned the city had granted appellant the necessary

Indianapolis, Bloomington and Western Railroad Company v. Hartley.

authority to construct its road across the street, and the principal question in the case is, whether the State and the municipal authorities combined have the power to grant the company the right to construct its tract across lands the fee of which is in appellees, without obtaining their consent or making compensation.

On the one hand, it is insisted appellees' proprietary rights have been interfered with, and that the action of the company in taking possession of the lands comes within the constitutional inhibition that private property shall not be taken for public use without just compensation. On the contrary, it is claimed that it is immaterial whether the city owns the fee of the street or not; the municipal authorities have the supreme control over all streets, and can grant the right to lay a track on or across any street, and having done so in this instance, if ingress and egress are not materially affected, is *damnum absque injuria*.

The exact question presented has not been passed upon by this court. The authorities bearing on it are by no means harmonious. There are a class of cases that hold it is immaterial whether the municipality owns the fee in the streets or not; it may, if the legislature has conferred power for that purpose, grant a railroad company the right to construct and operate its road along or across any public street. In another class of cases the power has been confined to municipalities owning the fee of the streets.

Both classes of cases, however, rest upon the same principle, viz.: a railroad is only an improved highway, and the public, having the right to the exclusive use by legislative authority, may grant the use of streets for this mode of travel, although no such use was contemplated when the streets were dedicated to public use.

The decisions in this State prior to the adoption of our present constitution are in reference to cases where the city granting the privilege owned the fee of the streets. The trespasses complained of in the case at bar were committed prior to the adoption of our present constitution, and the right to recover is not affected by its provisions.

In *Moses et al. v. Pittsburgh, Ft. Wayne and Chicago R. R.*, 21 Ill. 516, it was held, where the corporation owns the fee of the streets, and by its charter the local authorities are invested with exclusive control over them, and those authorities grant permission to locate railway tracks along a street, the owners of property front-

Indianapolis, Bloomington and Western Railroad Company v. Hartley.

ing thereon cannot enjoin the laying of such tracks, nor receive any damage or compensation for the use of the streets so occupied.

In *Murphy v. The City of Chicago*, 29 Ill. 279; it was held to be a legitimate use of the street or highway to allow a railroad track to be laid down in it, and for so doing the city is not liable to any damages that may accrue to individuals.

What is said in those cases is in reference to streets where the fee is in the corporation granting the privilege. No question of an ordinary highway is involved in either of them. We are not disposed to extend the principles or the reasoning of these cases any further, or apply them to cases not strictly within their meaning.

A distinction has been taken where the municipality granting the right to lay the track owns the fee in the streets, and where the fee remains in the abutting land owner, and it seems to us that it rests on sound principle, and is supported by the highest authority.

Where the fee remains in the original proprietor, it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication ; it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land, it was for no other purpose, and if it was condemned, his damages were assessed with no other view. A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road-bed and the carriages propelled thereon are owned by private individuals, and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance, without paying tolls or fares. The uses are totally different and even inconsistent. The one is exclusive in favor of private interest, and the other is open and free to all.

The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land owner, the corporation may grant the right to a railway company to lay its track along or across any street, but the company avails of its privileges at its peril. If, in laying its track, it causes a private

Indianapolis, Bloomington and Western Railroad Company v. Hart'ey.

injury to him who owns the fee in the adjoining premises, it must make good the damages sustained.

The following cases are in harmony with our views of the law, and are conclusive of the case at bar: *Presbyterian Society v. Auburn and Rochester R. R.*, 3 Hill, 567; *Williams v. N. Y. Central R. R.*, 16 N. Y. 97; *Mahon v. N. Y. Central R. R.*, 24 id. 658; *Inhabitants of Springfield v. Conn. R. R.*, 4 Cush. 63; *Haynes v. Thomas*, 7 Por. (Ind.) 39; *Tate v. O. & M. R. R. Co.*, id. 480; *Nicholson v. N. Y. & N. H. R. R.*, 22 Conn. 83.

Most of these cases proceed on the principle that the location of the track of the railroad on the highway is an additional burden and servitude upon the land, which would entitle the owner to additional compensation. Others go upon the ground that it is an exclusive appropriation by the railroad of the soil to its own use, which the owner had the right himself to use for any purpose not inconsistent with an easement in favor of the public, and for that reason have held it is taking private property for public use, and have required just compensation to be made. The cases can be maintained on either or both grounds. Neither the State nor the municipality has the power to grant away the private property of the citizen, and if corporations *quasi* public, in the exercise of the right of eminent domain, with which they are clothed by the sovereign power of the State, seek to appropriate it to their exclusive use, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value.

It is urged that the damages found by the jury are excessive. We do not think so. By reason of excavating for the track of appellant's road the grade of the street in front of the residence of appellees had to be materially lowered, so that ingress and egress by carriages from the street were rendered impracticable, and were made far more difficult for persons on foot than it had formerly been. There is no evidence that it would have been necessary to lower the grade of the street except for the location of appellant's road. The damages sustained by the appellees are marked and appreciable, and there is no reason why the judgment should not be affirmed.

The judgment of the court below is affirmed.

Judgment affirmed.

CITY OF PEKIN, appellant, v. BRERETON.

(97 Ill. 477.)

Municipal corporation — Liability for injury to private property for obstructing access thereto.

A city granted to a railroad company the right to lay its track along a street. The company, in laying its track, made excavations obstructing the use of plaintiff's adjoining premises and endangering their stability. *Held*, that the city was liable.

ACTION in the case against the City of Pekin to recover damages to lots owned and possessed by plaintiffs, in consequence of the construction of a railroad in a public street of the city opposite the lots. It was claimed that the making of deep excavations in the street and sidewalk obstructed plaintiff's use of the lots, and put plaintiff in fear that the lots and tenements would be injured by caving in. The opinion states the remaining facts.

Thomas Mahon, and Sawyer & Prettyman, for appellant.

Roberts, Green & Purple, for appellees.

BRERETON, J. This case comes before us on a stipulation as to the facts, and on the rulings of the Circuit Court on the instructions.

It is not denied, if appellants are liable at all, this action is well brought, but it is claimed by them they are not liable to any action. Their claim to immunity is placed on the ground that the control of the streets of the city is in them as a municipal corporation, placed there by their charter, and as the railroad was constructed for the public good, as is admitted by appellees, appellants are not responsible to individuals for any damages resulting to them in the lawful exercise of a power with which they are vested.

It is admitted the authorities of the city had not, prior to the injury of which complaint is made, established the grade of these streets by any ordinance or other act or resolution, and that the title to the lots in question, and the actual possession thereof, were in appellees at the time of the injury and of action brought. It is

also admitted that the property of appellees was damaged by the excavation and embankments made by the railroad company, to the amount of six hundred and fifty dollars, as found by the jury in their verdict. It is also admitted the railroad company were authorized, by an ordinance of the common council, to do the acts they did do, and of which complaint is made. It does not appear that the fee of these streets is vested in the city of Pekin.

On the questions presented, the authorities are not entirely harmonious. We do not deem it necessary now to review them, as that labor has been performed by this court in *Nevins v. The City of Peoria*, 41 Ill. 502, which, in principle, is analogous to this case.

To sustain the views held by the counsel for the city, the case of *Wilson v. The Mayor, etc., of New York*, 1 Den. 597, was relied on as it is in this case, holding, as it does, a city was not liable for damages resulting to the property of one from the exercise of a power with which they were clothed. This court, whilst admitting the power to grade the streets, said, that the mode in which the power is to be exercised, in reference to the rights of others in the enjoyment of their property, is limited in the same way and to the same extent as the power of a private person in the use of his property, unless the city calls to its aid the right of eminent domain; and if it does that, the right is to be exercised on making compensation as required by the constitution.

We do not deem it necessary to question, here, the authority of the cases cited by appellants, among which, and a leading case, is *The Proprietors, etc. v. The N. S. R. R. Co.*, 10 Cush. 385, where it was held, if an injury done by any one is, in its nature, common and general, the law requires, instead of a multitude of private actions, that it shall be the subject of an indictment or other public prosecution.

But, in this case, it was said that all direct damage to real estate by passing over it, or part of it, or which affects the estate directly, though it does not pass over it, as by a deep cut or high embankment, so near lands or buildings as to prevent or diminish the use of them, all these, and others of like kind, are proper subjects for the assessment of damages.

Did it appear in this record that the construction of this railroad upon these streets worked injury to appellees only in common with the rest of community, we would be disposed to hold no private action would lie, but here is shown a direct, special injury, affect-

City of Pekin v. Brereton.

ing appellees only. It is not an injury common to all, but special to appellees.

In *Nevins v. City of Peoria*, *supra*, the authorities on the points made here and cited here were reviewed, and this court reached the conclusion that, although a city has power and authority to elevate or depress the grade of its streets, as it may deem proper, yet if, in so doing, it inflicts an injury upon a lot owner, peculiar to him alone, it cannot be exempted from liability; and should it become necessary, for the interests of the public, in the process of grading the streets, or, we may add, laying down a railroad track thereon, the lot of an individual shall be rendered unfit for occupancy, wholly or in part, the public must pay for it to the extent to which it deprives the owner of its legitimate use.

This was said under the constitution of 1848, and is based upon the well-known and approved maxim of the common law, "So exercise your own rights as not to injure others."

But the constitution of 1870, in force when the injury of which complaint is made, was done, provides in the "Bill of Rights," § 13 of the second article, that "private property should not be taken or damaged for public use without just compensation." It will not be denied this provision rests upon a great principle of right and justice which would, doubtless, be applied by courts in every proper case without constitutional sanction. With this clause of the constitution before us, we cannot entertain a doubt of appellees' right to recover to the extent of the damage they have sustained.

The case of *Moses v. Pittsburg, Ft. Wayne & Chicago Railroad Co.*, 21 Ill. 516, and that of *Murphy v. City of Chicago*, 29 id. 279, were decided long anterior to the adoption of the present constitution, and are essentially modified by *Nevins v. Peoria*, *supra*, and also by *Indianapolis, etc., Railroad Co. v. Hartley*, 67 Ill. 439. We are, as time advances, the more convinced of the jusure of the views announced by this court, that, in the exercise of power conferred upon a municipal authority, private rights must be regarded; that individual property is not at the mercy of municipal power.

As the finding of the jury and the judgment of the court are in accordance with the views we have here presented, it is unnecessary to examine, particularly, the rulings upon the instructions.

The judgment must be affirmed.

Judgment affirmed.

CARROLL, appellant, v. CITY OF EAST ST. LOUIS.

(97 ILL. 503.)

Foreign corporation — right to buy and sell lands.

A corporation created in Connecticut for the sole purpose of buying and selling lands cannot buy and sell, or hold in perpetuity, lands in Illinois. It is against the public policy of Illinois.*

ACTION of ejectment. The opinion states the facts.

Charles Conlon and John M. & John Mayo Palmer, for appellant.

Wm. H. Underwood, C. C. Whitlesey and Glover & Shepley, for appellee.

WALKER, J. This was an action of ejectment, brought by appellee, in the Circuit Court of St. Clair county, against appellant, to recover a number of lots in East St. Louis. A declaration in the usual form was filed, and defendant interposed the general issue. The case was submitted to the court for trial, without a jury, by consent of the parties, and the issue was found for plaintiff, and a judgment was rendered in its favor.

The parties stipulated, on the trial in the Circuit Court, that, in September, 1869, the fee of the premises in dispute was in Samuel S. M. Barlow and others, and that they conveyed the lands in dispute to the "Connecticut Land Company;" that it was a body corporate, created by the general assembly of the State of Connecticut, by act of the 27th of July, 1860. Their charter shows Joseph Alsop, Wm. M. McFarland, Samuel S. M. Barlow and Wm. H. Aspinwall were created a corporation, with a capital stock of \$200,000, with the privilege to increase it to half a million.

They are empowered by their charter to adopt by-laws, provided they do not conflict with their charter, or the laws of Connecticut.

* See *Thompson v. Waters* (25 Mich. 214), 12 Am. Rep. 242.

Carroll v. City of East St. Louis.

The body is empowered to receive, grant, convey, dispose of and transfer real estate, and to take the management and charge of the same, as well as such personal property as they may deem necessary to carry on their business transactions, and sell and exchange the same for other property, as they may deem to the interest of the corporation. They are also authorized to make, execute and deliver all necessary instruments, either with or without the seal of the corporation.

The charter provides that the affairs of the company shall be managed by not less than seven directors, one of whom shall be president. The office of the company is, by the charter, located at Hartford, in that State.

It appears, from the stipulation, that the company purchased the property of Barlow and others, and took possession and held it until they conveyed to the city. It is also agreed that, after the sale was made to the city, defendant entered into possession of the lots and still holds them; that the company holds these and other lands in and near the city of East St. Louis, in the purchase of which their capital of \$500,000 has been expended. And it was finally stipulated that the points to be decided were: "Had the Connecticut Land Company power under their charter to hold the lands in fee simple under the deed from Barlow and others? Had the company power to convey the title in fee to the city?"

Can a corporation, created in another State, for the sole purpose of buying and selling lands, come here and prosecute the business for which it was created, by purchasing and holding lands in this State?

Owing to the interests involved in the case under consideration, and the results which may flow from the answer which may be given to this question, it is supposed to assume more than ordinary importance. Whether there are other sales similar to this, the record fails to disclose; and if there be any others, whether many or few, that fact could not change the law nor the decision of the case, and hence we shall disregard that portion of the argument which insists that other conveyances are endangered. We shall endeavor to decide the case on the record, as made and presented to the court.

All persons in the profession, we presume, will admit that a corporation, created in one State, cannot exercise its functions in another State or a different sovereignty without permission. This

is the doctrine announced in *The Bank of Augusta v. Earle*, 13 Peters, 589; *O. & M. R. R. v. Wheeler*, 1 Black, 297; *Ducat v. The City of Chicago*, 48 Ill. 172; and *Paul v. Virginia*, 8 Wall. 168. And if the proposition were not so fully understood and so firmly established, numerous other cases might be cited as confirming the rule.

The all-important question, then, in this case is, to determine whether consent can be inferred from the course of legislation as indicating the general policy of this State. If such consent exists, it can be gathered alone from implication, as there is no direct legislation on the subject. In the case of *The Bank of Augusta v. Earle*, *supra*, it was said that the comity between States, so far as it relates to corporations, depends for its exercise upon the laws of the sovereignty in which the power is to be exercised, and a corporation can make no valid contract without their sanction, expressed or implied. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. It is also said in the same case that, in the absence of any positive law, affirming, denying or restraining the operation of a foreign law, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It must be conceded that each State has the power, uncontrolled by another, to establish rules regulating the tenure of the lands lying within its limits, and the manner of buying and selling property by persons under its jurisdiction.

If, then, as there is no direct legislation on the subject, this purchase by the Connecticut Land Company is repugnant to the policy of the State, or it is prejudicial to its interests, the sale we have seen would be void. In this investigation, it must be remembered that the law-making power of the State where the authority is proposed to be exercised is alone invested with the authority, and must determine its public policy. With this power the courts have not been intrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it. The public policy of the State may be ascertained by reference to the general course of legislation, either by prohibitory or enabling acts, or by its general course of legislation on a given subject.

Our general assembly have, in a variety of modes, and on a very

large number of occasions, manifested, in unmistakable terms, a determination that perpetuities in real estate shall not exist in this State. To prevent it, and to keep the tenures of the lands in the State free, at an early period in the legislation of the State, the common law allowing entails was abolished, and such conveyances rendered inoperative to create such an estate. And, inasmuch as such tenures create a perpetuity in particular families, it tends to give to them special privileges not enjoyed by all. It is the foundation upon which aristocracies are built and sustained. It takes real estate out of market and prevents its acquisition by the citizens generally, and prevents its distribution even in families by devise or descent. These, and it may be other considerations, have induced, it is believed, every State in the Union to abolish estates tail, because they, by creating perpetuities, are not in harmony with the principles upon which our government is based, and are prejudicial to the general welfare and prosperity of our people.

The policy of the legislation in this country, ever since the establishment of our form of government, has been with a view to leave all free to acquire property, and to protect and foster no class by conferring special privileges, or placing, or even permitting wealth to be placed, in the hands of a portion, to be held in perpetuity. In fact, its pernicious effects were so clearly seen and felt in Great Britain, that perpetuities have been discountenanced in their jurisprudence. The theory of our government is, that not only the laws must protect all alike, but that every citizen must be left equally free in the pursuit and acquisition of property. When feudalism prevailed throughout Europe, the care of the governments was for the lords and the privileged classes, and entails and perpetuities of tenures in their families, or particular portions of them, was adopted as the best means to secure their continued wealth and influence. But as trade and commerce advanced, and the principles of free government became better understood, it was found that the public welfare was retarded by restrictions upon the tenures to their landed property, and for centuries the fetters that have been gradually and constantly relaxing and being removed, until many of the inconveniences attending this system have disappeared.

Of the same nature as the feudal system were monasteries and religious houses, that acquired large bodies of lands and held them in perpetuity. The prejudicial effects of this policy were, at an early day, felt, as it took real estate out of the commerce of the country,

and was found to be a serious impediment to national prosperity if not to advancing civilization. This was, perhaps, the strongest motive that led to the enactment of the laws of mortmain in Great Britain. There were, no doubt, other considerations, such as, that it curtailed the power and influence of the feudal lords, and their loss of revenues, by being deprived of their escheats, wardships, reliefs and the like. Hence, these laws of mortmain were adopted, allowing the lord immediate to declare a forfeiture of the estate sold to a corporation, and on his failing to do so, then the lord mediate might, and on his failure to do so, then the king.

Thus it will be observed that these statutes do not prevent corporations from taking title by conveyance, but only enabled the forfeiture of the title, which thus passed to the lord or the king. If, then, these bodies are not prohibited from taking by the laws of mortmain, they, if in force in this State, would not prevent this corporation from holding lands, until the State should proceed and obtain a forfeiture. Whether or not they are in force when applied to a proper case, we shall not now determine, as we think they have no application to this case.

Our general assembly have, from the very organization of our government, manifested a clear and decided opposition to permitting corporate bodies to hold lands to any great extent in perpetuity. In granting charters to insurance, agricultural, manufacturing and benevolent organizations, of which we have large numbers, as a general rule, with, it may be, a few exceptions, when authorized to buy and sell lands, they have been restricted to a small quantity. So jealous has been the legislature of the power to purchase and sell lands by these organizations that it adopted, as a policy, that the authority thus given should not be perverted and abused; that they, as an undoubted policy, limited the power to only enough of real estate to enable them to carry out and accomplish the purposes of their organization, other than buying and selling real estate.

In the advancement of education, the most cherished object of our people and their representatives, we would expect, if anywhere, to find the greatest and most liberal relaxation of this policy. If permitted to own and lease large farms, colleges, academies and seminaries could thus greatly increase their revenues and avoid the financial embarrassments that so generally overtake and destroy these popular institutions. But even the great object of education

has not induced our general assembly to depart from its policy of preventing these bodies from holding lands in perpetuity. In the great number which have been incorporated by special charter, we have examined many, but have found none but are limited to comparatively a small quantity of land. The general assembly seem to have been determined, no matter how useful the ownership of land in perpetuity might be in supporting these institutions, or how much it might aid in accomplishing the object of their creation, they should not have that means. And where, in such charters, power has been given to receive donations of lands, they have, almost invariably, been required to sell it in three, five, seven or ten years, at most, thus unmistakably showing a settled policy that no means should be possessed by corporations, whether as the primary or auxiliary purpose of their creation, to hold lands in perpetuity. So with churches; all know that the burdens of supporting religion could be greatly diminished if they could hold large bodies of lands and houses, and derive large revenues from rents and profits. But it is believed that our legislature has not, unless it be with rare exceptions, departed from its fixed policy even with these bodies, where incorporated.

In fact, the whole course of our legislature, in the hundreds of charters granted, shows a fixed and stern determination not to yield such powers to these bodies. At the session of 1843, the general assembly passed a general law, authorizing the organization of incorporated seminaries and academies of learning. Whilst this law granted large powers to such bodies, it expressly inhibits them from severally holding more than 160 acres of land. This law was revised in 1849, when the power to hold lands was increased to 1000 acres. In 1835 (p. 188) a general law was adopted, authorizing the incorporation of religious societies, and by it these bodies are limited to 10 acres. And the act of 1839 authorized any church to hold 40 acres for camp-meeting grounds. The general law, found in the Revised Statutes (p. 121), for the incorporation of libraries, limits their property, real and personal, to the annual value of \$600, exclusive of their library and the annual payments made by the members.

In 1849, a general law was adopted, authorizing boards of trade to be incorporated, and limits their powers to hold real estate to city, town or village lot, and building, in the city, town or village where the body is located.

In 1852, a general law was passed authorizing the incorporation of hospitals for boatmen, and it limits the amount of land such an organization can hold to 10 acres.

At the session of 1855, a law was adopted authorizing the incorporation of agricultural societies, and they are prohibited from holding more than \$10,000 worth of property, of every kind or description. At the same session, a law was adopted authorizing the formation of incorporated cemetery associations, and they are limited to 50 acres.

At the session of 1859, a law was passed, authorizing the formation of benevolent societies as incorporated bodies, and by implication limits the power to hold real estate to the lot and house used by the company, and to donations, which, by the eighth section, is required to be sold within five years.

At the session of 1849, a law was adopted, enabling the formation of corporations for manufacturing, agricultural, mining and mechanical purposes, and it limits the amount of real estate which they may hold to what is necessary to carry out the general purposes of their organization.

Another law was adopted in 1859, for the organization of incorporations for benevolent, educational, library, musical, scientific and missionary purposes. The eighth section prohibits, by implication, the holding of real estate to the lot and building thereon used by the company, and requires donations of lands to be sold in five years.

In the act of 1857 (p. 161), the incorporation authorized for manufacturing, mining, mechanical and chemical purposes, is authorized to hold only so much real estate as may be necessary to carry out the purposes of their organization. Other general laws might be referred to, as well, it is believed, as hundreds of special acts which contain similar restrictions.

We are fully aware that the object of the creation of such bodies was not to buy and sell lands, but the legislature seem to have been vigilant in expressly preventing such bodies from using the power contained in most of their charters to purchase and convey such property, from being perverted to such a use. It is this extreme caution that manifests the policy of the law-making power of the State. We do not infer this policy, as seems to be supposed, because the legislature did not, in terms, confer the power on these

Carroll v. City of East St. Louis.

various bodies, but it is from the almost uniform prohibition of its exercise, and in this is the distinction.

We have been referred to some half a dozen private acts passed by our general assembly, creating corporations for various purposes, in which power is, incidentally in some, and as the primary object in others, given to buy and sell lands. They are special and private laws, and to our minds do not tend, in the slightest degree, to determine the general policy of the State on the subject. Like all other exceptions, they tend to establish, rather than impair, the force of the general rule. It is to the general laws of a State to which all persons refer to ascertain its general policy, but in this case our special legislation is overwhelmingly in support of the general laws on the subject. We are totally at a loss to conceive how we can infer that, because a few special charters are opposed to the fixed and almost uniform policy of the State, for a half of a century manifested on almost every occasion when a charter was asked, that the entire policy of the government has thus been changed. We regard it as forming none, not even the slightest ground, for such an inference. But since the charters referred to were adopted, as also that under consideration, the same policy has been clearly manifested.

At the session of 1871-2, the general assembly, in revising the general incorporation laws, have adhered strictly to the policy so clearly manifested by former legislation. The first section of that law provides for the formation of such bodies for any lawful purpose, except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money. It is contended that this section, by implication, authorizes the formation of incorporations to buy and sell real estate, as it does not, in terms, prohibit it, and if so, the Connecticut Land Company may do so, as we should infer a change of policy. If this was the only provision in this enactment, it would be a violent presumption, in view of the past legislation, to arrive at such a conclusion. But the fifth section relieves it from all doubt, if there is any, as it limits all but churches organized under the act, to so much real estate as may be necessary for the purposes of their organization. Churches are, as before, limited to ten acres; but corporations are authorized to purchase lands in satisfaction of debts due them, but are required to offer the same for sale at public auction, as often, at least, as once in each year, and if not thus sold for cost and

interest within five years, the State's attorney is required to institute proceedings in the Circuit Court for the sale of such property.

We should not expect that foreign corporations, who can perform no binding act in our State without our consent, would demand more rights and privileges than are conferred on our own, created by general law. If the general assembly, for any reason, confers special powers upon a few corporations that have been persistently and almost uniformly denied to all other corporations of our State, it gives foreign bodies, who only act here by mere sufferance, no right to demand the same privileges. They should surely not complain if permitted to exercise their powers here to the extent, and only to the same extent, that similar bodies of our own are allowed under our general laws.

Again, we learn from the journals of the two houses of the general assembly, that a charter similar to this, and apparently for the same purpose, and to subserve the same interest, was asked at the session of 1867, but it failed to pass because of an adverse vote. The application was renewed at the session of 1869. The bill passed both branches of the general assembly, and was sent to the governor for his approval, but he returned it, with his objections, to the senate, where it originated. In his message, the governor placed his objections on the ground of public policy; and that, even if that bill were harmless, still it would form a dangerous and unwise precedent. In these views, the senate seem to have almost unanimously concurred, although the charter limited its existence to twenty-five years, as but three members voted for its passage notwithstanding the governor's objections, and all of the other members, against its adoption.

In the light of all this legislation, it would require a great stretch for the courts to disregard the policy of the State which has obtained from the first. It is the legislative, and not the judicial, power in the State that must control and give shape to its public policy. That power does not pertain to the courts. They can only observe that policy and apply it to cases as they arise, without changing or obstructing it.

The charter of this company, by obscure language, gives power to purchase lands, and authorizes the body to sell and convey the same. There is nothing in it requiring them to sell a foot of such lands for centuries to come, and if efforts were made to compel them to sell, then the claim of vested rights would, no doubt, be

interposed. Again, that body is beyond the reach of our laws to dissolve it if they abuse their franchises and forfeit their charter. Hence it would be, no doubt, highly prejudicial to our people to have lands held in their midst in perpetuity, and beyond the reach of our laws, let them abuse their powers as much as they might choose. Nor are we prepared to hold that a sister State may send here, purchase large bodies of our lands, and lease and control them and their title under the laws of that State. And if the State cannot, it cannot create an artificial body to come here and hold them under such regulations as their charters or amended charters may prescribe.

We have been referred to numerous and able opinions of courts of other States, for whom we have the highest respect, which announce a different rule from that we have adopted. In those opinions, we have no doubt they have fully and fairly carried out the legislative policy of their States. But we have as little doubt that their public policy differs from ours. What may be supposed to be highly calculated to advance the public interests of one State, may be regarded as pernicious in another; hence the great diversity in the statutes of the various States, which are but a manifestation of the public policy of each State. And, in the light of the past and present legislation in this State, we do not entertain the slightest doubt that we have, in this case, adhered strictly to the fixed policy of our State, and if so, we are powerless to change that policy if we would. If, in our conclusions, we are mistaken, the legislature can, and no doubt will, promptly apply the corrective.

We will say that, since the petition for a rehearing was filed, we have gone over and carefully reviewed the entire grounds of our decision, and have found nothing to even create a doubt as to its correctness, but have availed ourselves of the opportunity of putting our views in somewhat a different form, which will be substituted for the opinion previously filed. We are, therefore, compelled, in view of the conclusion at which we have arrived, to hold that it is manifestly against public policy, and would be prejudicial to our State, to permit the Connecticut Land Company to come here and purchase and hold lands, and sell, or hold them in perpetuity, as they might choose; and we, under the authority of *The Bank of Augusta v. Earle, supra*, must hold that, by the effort to purchase, this company took no title to these lands, and

Carroll v. City of East St. Louis.

were unable to transmit any to the city. Hence, there was no right to recover, and the judgment must be reversed.

We do not desire that what we have said shall be applied to incorporations, whether domestic or foreign, which have purchased lands for the mere purpose of erecting offices or buildings necessary for the purpose of carrying out the legitimate business for which they were organized, and in purchasing lands in collecting debts. In such cases, where their charters have authorized it, we presume they might purchase and hold real estate to that, but no greater extent.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

SCOTT and SHELTON, JJ. In so far as the above opinion would hold invalid a transfer of land by the corporation to a purchaser, we are not prepared to concur therein.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

BURGESS V. CARPENTER.

(S. C. T.)

Action — master and servant — action by master for injury to servant

Plaintiff hired laborers to make a crop on his farm, under a contract by which the laborers were to have one-third of the crop for their services, the plaintiff retaining two-thirds for himself. In June, one of the laborers was shot, and so severely wounded that he was disabled from working in the crop for several weeks, and, in consequence thereof, as it was contended, the crop made was much less in quantity than it otherwise would have been. *Held*, that plaintiff had sustained no legal injury which gave him a right of action against the party who inflicted the wound.

The common law gives the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except where the servant is a menial one—*semble*.

ACTION on the case brought to recover damages, which plaintiff sustained by reason of loss of service of a hired servant, a colored man, named Henry Burgess, employed as a ploughman by plaintiff for the year 1866, the said servant having been disabled by reason of a gunshot wound, charged to have been inflicted by defendant.

Dr. T. L. Burgess, witness for plaintiff, testified, that Henry

Burgess v. Carpenter.

Burgess was wounded about 7th June, 1866, by a gunshot, and that he took him to his house and nursed him for several weeks, and supported him while he was unable to work ; that Henry Burgess was unable, in consequence of his wound, to do any work until some time in August. It was worth two or three dollars per month to furnish food for him. Henry Burgess was a ploughman, and, in consequence of his being unable to work, the crop was seriously damaged, and cut short at least \$400, the plow being stopped during his sickness. Plaintiff did not hire, or try to hire, any one in his place. Scarcely a living was made that year. Henry Burgess was hired for what was known as a share in the crop ; one-third of the crop being divisible amongst the laborers as their pay—plaintiff furnishing stock and provisions, and receiving two-thirds of the crop, and the laborers one-third amongst them.

The horse used by Henry Burgess was not worked in the crop while he was sick and disabled, and was fed by plaintiff.

At this stage of the trial, his honor held that it was useless to go on and connect the defendant with the shooting, because the contract to pay Henry Burgess a share in the crop made him a co-partner, and not a servant ; and that plaintiff had no right of action against defendant ; and he ordered a nonsuit.

Plaintiff assigned the following grounds of objection to the ruling of his honor :

1. Because, it is respectfully submitted, his honor erred in ordering a nonsuit upon the ground that the plaintiff had no right of action against defendant, because plaintiff's servant was to receive a portion of the crop for his services.

2. Because his honor erred in holding that the plaintiff and the servant, for the loss of whose services the action was brought, were copartners, it not having been clearly established what were the terms of the contract under which the said servant was employed.

3. Because his honor erred in ordering a nonsuit, when plaintiff had examined but one witness, and before he had been permitted to go to trial.

4. Because his honor ordered a nonsuit when, it is respectfully submitted, he had no right to do so for any cause.

Fraser. for plaintiff in error.

Galluchat, contra.

Burgess v. Carpenter.

WRIGHT, J. This was an action brought to recover damages which plaintiff claimed to have sustained by reason of a gunshot wound, charged to have been inflicted by defendant upon one Henry Burgess, who was a contractor with plaintiff, in common with other persons, for a share of the crop, which all parties to the contract were laboring to raise at the time the gunshot wound was said to have been inflicted upon the said Henry Burgess.

It was claimed, by plaintiff, that the said Henry Burgess was his servant, inasmuch as he had contracted with him to raise a crop. The relation of master and servant, as it existed in England, was wholly different from the relation of employer and employed as it exists in this country. At common law, in England, the master might bring an action for damages against a third party for any loss he might have sustained by reason of such party unlawfully injuring or interfering with his servant or servants; but this power, given the master, was only to be exercised toward menial servants — *domestics infra mœnia*. It was a relation which the common law classed with the relation of "parent and child." The master was held to stand in *loco parentis*. No such relation existed between plaintiff and Henry Burgess. In Pennsylvania, in a case under the intestate law of April, 1794, in which a preference is given to the wages of servants, the courts have restricted the term "servant" used in the act to "persons employed in the house and about the intestate's person," in order that, when disease had rendered the master helpless, there might be an additional reason to attention on the part of the domestic or menial. A case arose in which a bar-keeper brought suit for his wages, and Chief Justice GIBSON and Justice DUNCAN, of the Supreme Court, decided that he had preference, under the law, because his position as bar-keeper brought him within the term "servant," as his duties as such made him a domestic. *Boniface v. Scott*, 3 S. & R. 352.

Chief Justice GIBSON says, in Pennsylvania none are called "servants whose persons are not subjected to the coercion of the master, whether the business in which they are employed be servile or not. No person to whom wages *could* be due for his services would endure the name, as it would be considered offensive, and a term of reproach. I take all who are employed for hire in the domestic concerns of the family, in whatever station they may be, to be servants, entitled to a preference under the act. Neither do I apprehend it to be

necessary that the occupation of such persons should be exclusively confined to the family.

"The clerk in a counting house, etc., is exclusively concerned with the occupation or trade by which his employer gets his living; and there being nothing of a domestic cast in the nature of his services, he would not fall within the act. If, in this country, a tavern were a separate establishment, unconnected with the domestic scene, I should suppose the plaintiff not entitled to a preference; but the contrary is the fact; with, perhaps, the exception of one or two large establishments in Philadelphia, the concerns of the family are so blended that it is impossible to separate them," etc., etc.

In the same case, Justice DUNCAN says: "The term 'servants,' whose wages, under the act of 1794, are ranked with physic and funeral expenses, to be paid out of the intestate's estate, has received a judicial construction in *Ex parte Measan*, 5 Binn. 167. It has been held to embrace those only who, in common parlance, are called servants; that is, as I understand the opinion of the court, hirelings, who make a part of a man's family, employed for money, to assist in the economy of the family, or in matters connected with it."

Henry Burgess being exclusively concerned in the cultivation of the soil and the proceeds arising therefrom, and there being no domestic cast within the nature of his services, he does not fall within the class to which the term "servant" can, in any sense, be applied. He was a party to the contract, and liable for any breach of good faith on his part to comply with the terms of that contract; and plaintiff, being also a party to the same contract, sustained the same relation to Henry Burgess that Henry Burgess did to him; therefore, each was *sui juris*, and neither the servant of the other.

Henry Burgess being a free man, and competent to make a contract, is responsible for his own actions, and has the legal right of action against defendant for any private injury he has sustained at his hands. As each of the parties to the contract contributed his special portion of the means necessary to the production of the crop, and each was to receive his special portion after an equitable division, if there was a loss it was a common loss; and if the defendant committed an unlawful act which was the cause of such loss, then the parties to the contract, severally, have the legal right of action against the defendant for damages.

The State ex rel. The Attorney-General v. Platt.

This court, holding that on the statement of the plaintiff he had no cause of action, it made no difference at what stage of the case the judge below ordered the nonsuit, and his interposition, stated in the brief, did not prejudice the plaintiff.

The motion is dismissed.

MOSES, O. J., and WILLARD, J., concurred.

THE STATE *ex rel.* THE ATTORNEY-GENERAL V. PLATT, Circuit Judge.

(S B. C. 150.)

Statute — official copy not conclusive evidence of the terms of statute.

On March 1, 1870, the general assembly of the State passed an "Act to revise simplify and abridge the rules, practice, pleadings and forms of courts in this State." The 19th section of the enrolled act, to which the great seal of the State was affixed, and which was signed, in the senate chamber, by the president of the senate and the speaker of the house of representatives, and received the approval of the governor, provided that the courts for the county of Barnwell should be held at *Barnwell*; but it appeared by the journals of the two houses of the general assembly, that the same section of the bill, as it finally passed both houses, provided that the courts for that county should be held at *Blackville*. By the law, as it stood at the passage of the act, the place last named was the county seat of Barnwell county. *Held*, that the 19th section of the act was void, and, consequently, that *Blackville* remained the county seat of Barnwell county.

The enrolled act, duly authenticated as the constitution prescribes, and approved and signed by the governor, is not conclusive evidence of the terms of the bill, as it passed the houses of the general assembly, but the journals of the houses, or other appropriate evidence, may be received, to show what those terms were; and, whenever it appears that the enrolled act differs from the bill as it passed, in a substantial matter, the judiciary department of the State may declare the whole act, or the part affected by the change, unconstitutional and void.

Every substantial part of a proposed enactment is a "bill," within the constitutional sense of the term, and must pass through all the constitutional stages of enactment before it becomes law.

PETITIONS to the Supreme Court for writs of *mandamus*: in the case first stated, to command the Hon. Zephaniah Platt, circuit judge of the second circuit, to hold the Courts of General

The State ex rel. The Attorney General v. Platt.

Sessions and Common Pleas for the county of Barnwell, at the town of Blackville, in said county ; and, in the second case, to command N. G. W. Walker, sheriff of said county, to keep his office, as sheriff, with its books, records and papers, and office furniture, at the same place.

Under the provisions of two acts of assembly, one passed 2d March, 1869 (14 Stat. 202), and the other approved 26th March, 1869 (14 Stat. 250), the county seat of Barnwell county had been removed from the town of Barnwell to the town of Blackville, in that county, previous to the 1st of March, 1870.

On the day last mentioned, an act entitled "An act to revise, simplify and abridge the rules, practice, pleadings and forms of courts in this State," was passed by the general assembly of the State. It was duly enrolled, had the great seal of the State affixed to it, was signed in the senate chamber, by the president of the senate, and the speaker of the house of representatives, and was approved and signed by the governor. It was divided into parts, titles, chapters and sections, and it contained 475 sections. Part I, embracing the sections from 9 to 91 both inclusive, related to "courts of justice and their jurisdiction." Part II, embracing the other sections, except the first eight, related to "civil actions."

Part I, Title III, relating to "Circuit Courts," contained section 19 of the act, and this section of the enrolled act directed, *inter alia*, that the Circuit Courts for Barnwell county should be held at Barnwell, and this was the condition of the act when it was filed in the office of the secretary of State. In that office the word "Barnwell" was erased and "Blackville" inserted in its place, and with this alteration the act was printed by the State printer. "Blackville," therefore, appears in the printed copy of the act as the place designated by law for holding the Circuit Courts at Barnwell county.

From the journals of the two houses of the general assembly, it appeared that the 19th section of the bill, as it passed both houses, designated "Blackville" as the place for holding the Circuit Courts for Barnwell county.

Upon the foregoing state of facts being brought to the notice of his honor Judge PLATT, judge of the second circuit, to which the county of Barnwell was attached, he held that the question was concluded, by the terms of the enrolled act ; that "Barnwell" was the place fixed by law for holding the Circuit Courts for that county,

The State ex rel. The Attorney-General v. Platt.

and he made an order directing the sheriff and clerk of the court to remove their office books, records, papers and office furniture from Blackville to the last-named place.

The sheriff and clerk obeyed the order, and thereupon these petitions were filed.

Returns were made admitting the facts, and the cases were argued upon the question of law involved in them.

Chamberlain, Attorney-General, and *Carroll & Milton*, for State.

Maher, for respondents.

WILLARD, J. The attorney-general asks that the writs of *mandamus* may issue from this court in the case first above entitled, to the circuit judge of the second circuit, commanding him to hold the Courts of Common Pleas and General Sessions for Barnwell county at Blackville, instead of Barnwell, and, in the last-named case, commanding the sheriff of Barnwell county to hold his office at Blackville.

The main question involved is, whether Blackville or Barnwell is the place appointed by law for the holding of Courts of Common Pleas and General Sessions for that county.

It is alleged that section 19 of the "act to revise, simplify and abridge the rules, practice, pleadings and forms of courts in this State," passed March 1, 1870, as published by law, does not conform to the enrolled act deposited in the office of the secretary of State, as that act stood at the time the enrollment was made.

It is admitted, and is to be taken as one of the facts of this case, that, at the time of the enrollment of the act, and of its signature by the president of the senate and speaker of the house of representatives, and of its presentation to, and approval by, the governor, and also at the time of its deposit in the office of the secretary of State, the 19th section of the act provided that the Courts of Common Pleas and General Sessions should be held at Barnwell, but that, since being so deposited, the text of the enrolled act has been altered, so that the act, as it now stands, requires that these courts should be held at Blackville.

It is also alleged by the relator that it appears by the journals of the two houses of the general assembly that the act, as passed by the general assembly, required the courts to be held at Blackville,

The State ex rel. The Attorney-General v. Platt.

and that the enrollment did not, in this respect, conform to the law as passed.

It becomes a question for our consideration, therefore, whether we can look into the journals to see in what form the law actually passed the general assembly, or whether we are precluded, by the form of the enrollment, from further inquiry as to the terms of the act.

Under the constitution, the question whether an act of legislation has the force of law does not depend merely upon the constitutional majorities of the two houses having so determined, but upon the performance of certain acts, in part legislative and in part executive, and following each other in a certain order. By § 21, Art. II, it must have been read three times, and on three several days, in each house; it must have the great seal of the State affixed to it, and it must be signed in the senate-house by the president of the senate and the speaker of the house of representatives. By section 22, article III, it must have been presented to the governor, and have been approved and signed by him. But the governor's signature is not indispensable. If, after being returned with his objections, it shall have been reconsidered and approved, in each house, by two-thirds of such house, or if, after being presented for his approval, he shall neither approve it nor return it with his objections, within three days — when these prerequisites are complied with, the act acquires the force of law under the terms of the constitution. If either one fails, there cannot be a compliance with the conditions upon which, under the express terms of the constitution, the force of the act, as law, depends.

It appertains to the office and authority of the judicial department to enforce the limits imposed by the constitution upon the authority of the legislature, by refusing to give force to acts without their sanction, and, accordingly, to determine whether the acts have been duly performed upon which the force of the enactment, as law, depends. Having power to inquire into the existence of these jurisdictional facts, it may resort to whatever evidence, in conformity with the principles and rules of law, is esteemed most conclusive of the fact to be determined.

It is argued, however, that if the enrollment is fair on its face, and if the great seal is affixed to it, inquiry must there stop, at least so far as it is a question what are the provisions of the law that has been passed.

The constitution does not assume to determine what shall, or what shall not, constitute evidence, whether primary or secondary, of the facts upon which the authority of an act depends. To what source, then, shall we refer, in order to ascertain upon what evidence a judicial inquiry of this nature ought to proceed? This question is substantially answered by Judge COOLEY in a manner that commends itself for the breadth and soundness of its reason. He says (Cooley's Constitutional Limitations, 130): "If, when the constitution was adopted, there were known and settled rules and usages forming a part of the law of the country, in reference to which the constitution has evidently been framed, and these rules and usages required the observance of particular forms, the constitution must be understood as requiring them, because, in assuming the existence of such laws and usages, and being framed with reference to them, it has, in effect, adopted them as part of itself, as much as if they were expressly incorporated in its provisions."

It would be putting too narrow a construction upon the language just quoted to assume that its whole force was confined to cases involving mere questions of technical forms. The rules of evidence which should govern judicial deliberation upon questions of right arising directly out of the constitution are, in an enlarged sense, observances of form; and the principle laid down by Judge COOLEY, and carefully limited by him, embraces fairly matters of form in the sense thus employed. The necessities of this case do not require that this principle should be carried as far as it may with safety be carried. Following this rule thus laid down, in the absence of any express constitutional declaration as to the character and effect of the evidence appropriate for determining the existence of the facts upon which the force of an act as law depends, we must look to the settled rules and usages forming a part of the law of the country at the time of the adoption of the constitution, and also to the constitution itself, to see how far those rules and usages enter into its sense, and have become interwoven with its text. Upon the question, whether the great seal should stand as conclusive proof of any of the required facts, other than that of its being fixed as required, § 21, art. II, furnishes negative evidence.

When several independent acts are required to be performed, in order to accomplish a given result, to say that proof of the performance of one of them shall be admitted as conclusive proof of the performance of the others, is to say, in effect, that that one alone

is really requisite. If it should be admitted that the great seal possessed, by law, at the adoption of the constitution, the attributes ascribed to it, in respect of affording final and conclusive evidence of the facts certified under it, still there would be wanting evidence, to be sought for in the constitution alone, that such force was intended to be given to it in its bearing in weakening the safeguards of the constitution. Assuming the question to be, whether the act had passed the houses by the due number of readings — of which fact the constitution provided appropriate evidence, namely, the journals of the proceedings of the house (§ 26, art. II) — it is not to be presumed that it was intended that the act of affixing the great seal, an act performed apart from the legislative body, in an executive office, should furnish higher evidence of the proceedings of the body than its own journals.

Looking carefully into the essential character of the judicial act cast upon this court, it is evident that, allowing the great seal, or the signatures of the presiding officers of the respective houses, to stand as unimpeachable evidence of the identity of the act, as enrolled, with that acted upon by the houses, would be equally inconsistent with the object and intent of the constitution, as in the case just supposed. In order to determine whether an act has passed through all the requisite stages of legislative progress, its identity, in each of those stages, must be determined. If the formalities of enrollment do not prevent us from looking into the journals, in order to see that the bill had its proper readings, of what value will that be to us, if we are estopped by the enrollment from inquiry as to what bill the journals have relation? To give full force and effect to the constitution, if an issue of identity is raised, we must look into the bill or act, at each step of its progress, to determine that that which has received part of the formalities requisite to its validity as law is the same with that which has received the residue of such formalities. Hitherto this question has been considered in the simplest form in which it is likely to arise, that is, upon the supposition that the act, regarded as a whole, is not the same, as appearing by the enrollment, with that which passed through the preceding pages of enactment. In regard to this assumed case, we have no doubt but that we may look at the journals for the purpose of ascertaining the action of the houses, and into any evidence that may be appropriate to show the nature of the bill, the subject of such action. A more difficult question here presents itself. When,

The State ex rel. The Attorney-General v. Platt.

as in the present case, the act, as a whole, has unquestionably passed through all the requisite stages, but some part, either of a section or clause, or, as in the case in hand, a mere word, is found to constitute the difference between the act in its different stages of progress, it is necessary to look beyond the expressions of the constitution, to its substantial meaning and intent. As regards the general question, it is much simplified by the fact that the alleged error does not affect the general integrity or efficiency of the act, nor enter into any of the limitations and conditions by which the legislature sought to bound the sphere and scope of its provisions. It was, indeed, urged upon the argument that, in the course of legislative complications attending the passage of the bill, the choice between Barnwell and Blackville became an element of importance, as bearing on the composition of the vote that was relied upon to pass it; but that is a matter with which we have no concern, as we are not called upon to analyze the majority that voted for the bill, or to say what considerations might, or what might not, have influenced any portion of that majority to a different course of action. From the stand-point of legal construction, we must regard it as a matter of indifference, so far as the general scope of the act is concerned, whether the selection fell upon Barnwell or Blackville, or whether the subject was included or excluded from the bill. It is evident that a bill, having in contemplation a complete change in the modes and forms of legal procedure, could not be prejudicially affected in its general usefulness, and perverted from the object it was intended to secure, by uncertainty as to whether the Circuit Courts of Barnwell county were to be held at the one place or at the other.

It follows, as a necessary consequence, from what has been said, that if the clauses of the constitution in question operate to the extent of withholding force from a subordinate part of an act, on the ground that the formalities required for the act, as a whole, cannot be ascribed to such subordinate part, then we not only have power so to declare, but may resort to such evidence as, in conformity with the ordinary rules of procedure, may be appropriate to make such fact appear.

There remains the important question, whether the constitution, in prescribing the formalities that should attend legislative enactment, can be regarded as looking to the several parts, of which an act is composed, as well as to the act as a whole. Section 22, art.

II, of the constitution, declares that "every bill or joint resolution which shall have passed the general assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the governor, and if he approves of it, he shall sign it."

There are but two modes of viewing this clause as it regards the present question: either the term "bill" is to be regarded as exclusively applicable to the entire enactment as a whole, or else each substantial part thereof is to be regarded as a separate bill, dependent for its force upon its relation to the several stages of legislative and executive action.

It will be proper here to remark that this doctrine does not lead to the rejection of amendments, notwithstanding they have not received all the readings, for one of the main objects in requiring these separate readings is to increase the facilities of amendment. This may, therefore, be regarded as an exception to the general doctrine we have stated above, not springing as a limitation out of the principles fundamental to that doctrine, but imposed by the constitution itself, as read by the light of the usages and laws of the country prevailing at the time of its adoption.

In a technical sense, the term "bill" is applicable properly to the enactment as a whole. Although the technical sense of words should prevail, where not inconsistent with the clear intent of the instrument, yet when such intent requires that words should be used in the larger sense, it is competent so to regard them. If we should hold that the constitution regards the enactment as a whole, in an exclusive sense, we would be led to the inevitable conclusion that to become a law all the substantial parts of the measure must have together passed through all the requisite stages. The consequences of this would be, that alteration in a substantial part during such progress would be fatal to the whole bill.

By a substantial part, is meant any section, clause or word, that conveys a distinct expression of the legislative will which cannot be supplied by construction from the other parts of the act, leaving out of view that part in which the defect lies. Whether it is to be regarded as substantial, does not depend upon its importance or unimportance to the rest of the act, but upon its being, in itself, an expression of the legislative will, capable of being the subject of a separate act. It would lead us to the conclusion, in the present case, that, if the law in question, although, in substance, a code of legal procedure, differed, as it passed the houses, from the enrolled

The State ex rel. The Attorney-General v. Platt.

act, in respect of any matter, though a mere word, that covered a distinct expression of the legislative will, not capable of being made out by construction, applied to the rest of the act, the whole must be regarded as unconstitutional. That the constitution intended no such absurdity, is manifest. When a deed or contract cannot be carried into full execution by reason of error, the law invariably eliminates the error, either by construction or reformation, when that can be done without the substantial destruction of that in which it inheres. This principle is constantly applied to statutes where some independent matter, capable of severance from the body of a statute, is inoperative under the constitution. The rules of construction are based, in part, upon this principle, so vital to them that they would not only lose their scientific character, but fail to express that common sense fundamental to all legal systems, if deprived of it.

Forced upon the opposite construction, that every substantial part of a bill is to be regarded as a bill in the sense of the constitution, we find nothing in our way but the technical import of the term "bill." It is not easy to perceive why, if any detached part of a statute is a law within the meaning of the constitution of the United States forbidding States passing laws impairing the obligation of contracts, any part of a bill is not a bill under a clause intended to secure deliberation on the passage of legislative enactments. Such a conclusion is inevitable, if regard is had to the fixed principles governing constitutional construction. The objects had in view, by a constitution of government, are habitually substantial; matters of form are usually left to the legislative body, as subject to change with the progress of ideas and events. The great objects in view, in framing a constitution, are the division and distribution of the powers of government, the establishment of limits and boundaries beyond which they shall not be exercised, and the creation of an efficient responsibility tending to restrain and furnish the means to correct neglect or abuse of public authority. Clauses having for their object the creation of responsibility in the exercise of political functions are, to a large extent, intended to act upon the motive, either by way of creating inducements for right action, or removing the temptation or opportunity to such abusive exercise. This is, in part, accomplished by fixing the responsibility for all political action in some defined person, or body of persons, by securing deliberation in the performance of public acts, and by ascertaining

The State ex rel. The Attorney-General v. Platt.

modes of authentication and action in important cases vitally affecting the welfare of the State. It is obvious that, in construing clauses of this class, substance, rather than form, is to be considered. The object to be secured is to be sought for, not alone in the formal expressions of the constitution, nor yet in the technical character of the means employed to secure its ends, but, in the nature of the subject, intended to be acted upon through such means. In a word, the language of the constitution, in such cases, is to be construed in the largest sense fairly attributable to it, and that will best subserve the objects it has in view.

The clauses of our constitution under examination belong to the class just specified, their objects being to prevent abuses in the exercise of the most important function of the government, namely, that of making laws, by securing deliberation and solemnity of authentication in such form as to fix a personal responsibility at every stage in the progress of an act of legislation. It is altogether a mistaken view to suppose that the object of these clauses was either to confer upon the signatures of the attesting officers power to cover up fatal defects in the passage of acts, or to conserve the outward, visible and tangible form of a law, without consideration for the vital matters that are contained within it. We would altogether fail to appreciate the spirit that animates the system of constitutional law, the flower of jurisprudence, native to our own country, should we apply the narrow rules of technical construction contended for to the clauses in question. The principles characteristic of that system have been evolved from the highest reason under the experiences of a political system securing the largest field of human action and motive for the enterprise of thought. They are like the atmosphere we breathe, animating and all-pervading, and if not definable with that sharpness of outline that affords the highest qualification to the scientific mind, yet they are capable of reducing to precision and definiteness of outline the institutions and laws which derive their substance and vigor from them.

We are forced to conclude that the safeguards set forth in section 23, article 3, of the constitution, are applicable, not only to the title and body of an act of legislation, but to every substantial matter contained therein, with the same effect as if such substantial matter was an independent act of legislation in itself.

As we have already concluded that we may look into the jour-

The State ex rel. The Attorney-General v. Platt.

nals, or beyond them, in a proper case, in order to see that there has been a compliance with the terms of the constitution, it remains for us to ascertain whether the designation of a place for holding the Courts of Common Pleas and General Sessions for the county of Barnwell has been accomplished by section 19 of the act in question, in accordance with the requirements of the constitution.

The journals of the general assembly make it to appear that, as the bill stood on its final passage, section 19 read Blackville, while it read Barnwell as presented to the governor for his approval. The consequence is, that so much of section 19 as attempts to designate a place of holding said court is without the force of law. In other words, the legal effect is the same as if an independent act, making Blackville the place of holding the courts, had passed the general assembly, and a totally different act, making Barnwell the place, had been submitted to the governor, in lieu of that passed by the general assembly.

Previous to the passage of the act in question, the place of holding the courts was fixed by law at Blackville, and, unless that law has been repealed by this act, that place still remains the place of holding such courts. Section 471 of the act of March 1st, 1870, contains the repealing clauses, which only extend to statutory provisions inconsistent with that act. As the act does not designate as law any place of holding such courts, there is nothing inconsistent that can lead to the repeal of the former act.

Before leaving this portion of the case, it is proper to remark, in view of the important bearing of the act in question, on the jurisdiction and forms of proceedings of the courts, that, in our judgment, the residue of the act, beyond that portion held by us not to be of force as law, is unaffected thereby, inasmuch as that is a distinct and independent matter, no way affecting the scope and efficiency of the act, according to the intention of the law-maker.

In the case of the application against the circuit judge of the second circuit, it is sought to obtain a *mandamus* requiring him to hold his Courts of Common Pleas and General Sessions at Blackville instead of at Barnwell. It is admitted that the last term was held at Barnwell. The next term for Barnwell is to commence on the second Monday of December next. The initiatory step toward the holding of that term is the issuing of the *venire facias*. By section 8 of the "Act to regulate the manner of drawing jurors," passed September 26, 1868, this writ is to be issued by the clerk at least

The State ex rel. The Attorney-General v. Platt.

fifteen days before the commencement of the term. Unless that act is compelled, or voluntarily performed, the term must, for all substantial purposes, fail. The circuit judge has no other power than this court possesses to compel the performance of this act, namely, a writ of *mandamus*. By *mandamus* he may compel the clerk to make his writ returnable at the proper place of holding the court. Should a writ of *mandamus* be issued to the circuit judge, he could be called upon to yield no further obedience to it than by his personal attendance at the time and place of holding the court. His presence does not insure the presence of the other necessary component parts of the court. It is not the office of the writ, when issued by this court, to forestall such judicial determination as he may make on a writ of *mandamus* issued by himself, nor to compel him to issue such writ.

The issuing of the writ by us, under such circumstances, is novel, ineffectual and unnecessary. It is to be presumed, in view of the present determination of this court, that the circuit judge will hold his court at the proper time and place, if the requisite preparations have been made by the other officers whose corporate action is necessary to the assembling of a court. Should they fail to perform their duty, there is abundant means of compelling such performance; but that cannot be done by means of a mandate addressed to the circuit judge.

The sheriff is bound to hold his office at the place of holding the courts, and that, as we have held, is Blackville. The public have an interest in the performance of this duty, and they have a right to the means of compelling it through their official representative, the attorney-general.

The prayer for a writ against the circuit judge of the second circuit is denied. A peremptory writ will issue in the case against the sheriff in accordance with the relator's prayer.

WRIGHT, J., concurred.

Coogan v. Parker.

COOGAN V. PARKER.

(S. C. 255.)

Landlord and tenant—destruction of demised premises by casualties of war — when tenant released.

Covenant on a lease for seven years from 1st July, 1859. The rent which had accrued up to the 1st April, 1862, had been paid and the action was against the lessee, to recover so much of the rent as had accrued from that day until the end of the term. The defense was that the defendant had been deprived of the beneficial use and enjoyment of the premises, according to the intent of the lease, from and after the 1st April, 1862, by the casualties of war, but it was no part of the defense that the defendant had surrendered, or offered to surrender the lease, or otherwise to rescind the contract, and it was in evidence that he used and occupied the premises, after the close of the war, in 1865, until the end of the term. *Held*, that the defense set up was insufficient to relieve the defendant from the plaintiff's claim.

The authorities reviewed, and the true doctrine applicable to the defense held to be, that where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder, shall be discharged from the payment of rent.

If the tenant be deprived of the beneficial enjoyment of the leased premises, according to the intent of the lease, that is a destruction of the subject-matter of the lease, within the meaning of those terms as herein used whether there be a physical destruction of the premises or not.

To complete the defense, the tenant must show that he rescinded the contract by a surrender, or offer to surrender, of all benefit therein which remained to him.

WRIT of error by the defendant below to the Circuit Court.

The action was covenant on a lease brought by Benjamin J. Parker and Elizabeth A., his wife, executrix of William Greer, deceased, plaintiffs below, against Patrick J. Coogan, defendant below. The following is a copy of the lease:

"STATE OF SOUTH CAROLINA, }
Charleston District.

"This indenture, made between William Greer, of the first part, and P. J. Coogan, of the second part, sheweth that I, William Greer, of the first part, do hereby lease unto the said P. J. Coogan, of the second part, his heirs, executors or assigns, for the term of seven years, to take date from the first day of July, eighteen hun-

Coogan v. Parker.

dred and fifty-nine, the premises known as the French Coffee house, No. — East Bay, for the sum of twelve hundred and fifty dollars a year, payable quarterly. The said P. J. Coogan, his heirs, executors or assigns, of the second part, agree to put and keep the premises in good order, and to keep the pumps, privies, roof, gutter, drains, cistern, etc., in good order always. And, furthermore, that if any improvements of any kind are made, that they are to remain on the premises; and that the said P. J. Coogan does bind himself, his heirs, executors or assigns to the above, and that the premises are to be known and used as a coffee-house, or restaurant; and it is understood and agreed that if, at any time, one quarter's rent shall be in arrears or unpaid, or the said lessee transfer this lease without the written consent of lessor, the said William Greer may be at liberty to determine this lease, and repossess the said premises. And, furthermore, the said P. J. Coogan, his heirs, executors or assigns, do bind themselves to carry out faithfully the written lease.

“WILLIAM GREER, [SEAL]

“P. J. COOGAN. [SEAL]

“Signed, sealed and delivered, in the presence of (this first day of July, eighteen hundred and fifty-nine.)

“R. S. PARKER,

“ALEX. OWENS.”

The plaintiffs, by their declaration and bill of particulars, claimed the rent due from 1st April, 1862, to 1st July, 1866, at \$312.50 per quarter, and interest.

The defendant pleaded several pleas. The third was as follows:

That the said plaintiffs ought not to have or maintain their aforesaid action thereof against the said defendant, because, he says, that before the commencement of this suit, and before the commission of said breaches in the plaintiff's declaration mentioned, to wit, on the 15th day of February, A. D. 1862, at Charleston, aforesaid, in the State aforesaid, flagrant war existed, and that portion of Charleston aforesaid, in which said leased premises in the plaintiff's declaration mentioned lie, was in the possession and under the control of one of the contending armies, and by virtue of the orders of the military power then and there present and acting, and in consequence of the casualties of war (for which the said defendant was in no way responsible, and which he could

Coogan v. Parker.

neither resist or control), said defendant was compelled to vacate and abandon said leased premises, and was then, and ever thereafter has been, deprived of the peaceable enjoyment thereof.

Issues were joined on all the pleas, and the jury found for the plaintiffs below the full amount of their claim.

The following bill of exceptions shows the points of law submitted to this court:

At the trial of the cause, the plaintiff, to maintain and prove the issue on his part, gave in evidence the lease executed on the 1st day of July, 1859, between said William Greer, deceased, and the said defendant, Patrick J. Coogan, and that the rent of the premises in said case mentioned had not been paid, as in said lease stipulated, since the 1st day of April, A. D. 1862, and that the sum of \$6,056.37, with interest thereon, was due thereon and unpaid, and evidence tending to prove that the defendant has never surrendered, or intended to surrender, said premises; but held the same during and after the termination of the war, and up to the end of his lease.

And the defendant, to maintain and prove the issue on his part, offered evidence tending to prove that insurrection and rebellion existed in South Carolina, and that the governor and executive council of the State of South Carolina, about the 10th day of February, A. D. 1862, promulgated the following order, to wit:

“STATE OF SOUTH CAROLINA, }
“EXECUTIVE COUNCIL CHAMBER, *February 7, 1862.* }

“The following resolution, by the governor and council, adopted at a meeting held this day, have been ordered to be published:

[EXTRACT.]

“*Resolved*, That the commanding general of the Charleston department is hereby authorized, in conjunction with the mayor of the city, to close all grog-shops and prohibit the sale of all intoxicating drinks in the vicinity of the lines of fortifications now being erected in and about the city of Charleston, during the time that negroes are employed upon the same; and the said general and mayor are further authorized to establish such regulations for effecting these purposes as may be deemed necessary by them.

“Extracts from the minutes.

“By order of the governor and council

“F. J. MOSES, JR., *Secretary.*”

Coogan v. Parker.

That, pursuant to said order, the commanding general of the Charleston department of the State, in connection with the mayor of the city of Charleston, about the middle of February, 1862, closed up and prohibited all business of the defendant at the said French Coffee-house.

That, from that time forward, by virtue of said orders, and by the casualties of war, the defendant, without his default and against his will, was deprived of the possession of said premises.

That, after August, A. D. 1863, until the close of the war, in April, 1865, said premises were within range, and actually repeatedly hit and greatly injured by the bombardment of Charleston by the United States forces on Morris Island.

That, at the close of active military operations and the surrender of Charleston, in February, 1865, said premises were in a very dilapidated condition, so much so as to be uninhabitable.

That in June, 1865, the defendant petitioned Colonel Woodford, United States military commander of the post of Charleston, who then had the custody and control of said premises, for permission to occupy them.

That the petition was granted, and the defendant authorized to occupy the premises, free of rent, of the United States for the time, on the express condition that said defendant would put said premises in repair.

That, pursuant to said arrangement with said military commander, the defendant entered upon and repaired said premises, expending thereon about \$1,000, made the premises habitable, and thenceforward occupied them till June, 1866, when defendant surrendered the premises to the plaintiff.

Defendant further offered to prove that, on July 1, 1862, he paid \$312.50 rent, in full to April 1, 1862, for said premises, to William Greer, deceased, and that on that occasion said Greer and himself had a conversation as to the rent of said coffee-house, when said Greer informed defendant that "while the then state of things continued, he, Greer, could hardly expect him, defendant, to pay rent."

That from that time forward till some time in 1866, rent for said premises was never demanded by said Greer or any other person.

The court refused to admit the evidence, and instructed the jury :

Cocgan v. Parker.

That if the defendant leased the premises in 1859, as indicated by the lease of William Greer to him, for seven years, and pursuant to the lease the defendant was put in possession of the premises, then he must be held to the payment of all the rent, as stipulated, which has not been paid, with interest thereon from the time it became due.

To which refusal to admit said evidence on behalf of the defendant, and to the said instructions to the jury, the defendant then and there, and before the jury had withdrawn from the bar, did except.

Corbin, for plaintiff in error.

Duryea and Cohen, *contra*

WILLARD, J. It is important, before considering the question peculiar to the present case, to ascertain the state of the law of South Carolina as to the liability of a tenant for years to pay rent after the destruction of the subject-matter of the lease, from causes beyond his control. This question will be looked at apart from the effect of the covenants usually found in such leases, other than the covenant to pay rent.

It has been considered that *Bayley v. Lawrence*, 1 Bay, 499, and *Ripley v. Wightman*, 4 McC. 447, have introduced into this State a doctrine at variance with the common law, as expounded by the adjudicated cases in England, and the leading States of this country following the common law. So strong has this impression of the state of our local law been abroad, that it has been said that, in this respect, South Carolina follows the doctrines of the civil law. When it is considered that, both by custom and statute law, the rules and principles of the common law have been made the foundation of our judicial system, it will be apparent that strong necessity should exist before we ascribe to the courts that decided those cases, an intention to introduce into this State principles and rules foreign to our usages and system of laws. It is apprehended that a clear idea of the effect of these decisions, and a review of the state of the common law, on this subject, will make it apparent that no such necessity exists.

The doctrine acted upon by the courts of this State may be stated as follows: that where there is a substantial destruction of the sub-

ject-matter, out of which rent is reserved in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and, on surrendering all benefit thereunder, shall be discharged from the payment of rent.

Bayley v. Lawrence, 1 Bay, 499, is the first reported case in which this principle was applied. The report of that case is exceedingly brief, and it appears, by the reporter's note, that it was omitted in the publication of the cases of 1792. Why this omission occurred, whether as the result of accident, or because the report did not sufficiently present the ground of the judgment of the court, is not explained. That was an action of covenant for rent in arrear, brought on a lease of a shipyard, at Hilton Head, for ten years, dated the 6th day of June, 1774. The defense was, that the defendant was driven off by the casualties of war and deprived of the enjoyment. It was resolved, *per curiam*, "that the defendant ought to pay for the time he peaceably enjoyed the premises, but not for the time he was prevented by the casualties of war." This is all that is given to us of the facts of the case, or of the conclusions of the court. It does not appear whether the immediate cause of the defendant's being "driven off" and "deprived of the enjoyment" of the shipyard was force or fear acting upon him personally, or the destruction of the property that constituted the main value of the shipyard, as such. Nor does it appear whether or not the defendant resumed possession of the premises after the end of the hostile occupation, which must have ceased before the end of the term. We are left to infer in deducing these important facts, vital to the understanding of the authority of the case. It is reasonable to infer that the principal value of the shipyard consisted in the buildings, ways, and other conveniences for building, repairing and launching vessels. Lands convenient for such a purpose are not likely to be valuable for agricultural, nor, when remote from populous communities, for other general purposes. Nor is it to be assumed that the site, occupied by this shipyard, possessed any extraordinary or peculiar value, as compared with other lands similarly related to the waters of that extensive harbor, so as to have formed an important element of the consideration upon which the rent reserved was agreed to be paid. As a hostile force would, naturally, seek to destroy the means by which an enemy could build and repair vessels, it is to be presumed that the conveniences and appliances that constituted the principal value of the

Coogan v. Parker.

shipyard were destroyed. If these conclusions are correctly drawn, the case is distinguished from *Pollard v. Schaffer*, 1 Dallas, 210, where it was held that the occupation of leased premises by an alien enemy was no ground for a reduction of the rent agreed on. Under this view of *Bayley v. Lawrence*, its doctrine will be found fairly embraced within the statement, already made, of the ground assumed by the courts of this State. It would be an instance of relief granted, in the nature of rescission, on the ground of the substantial destruction of the subject-matter of the lease.

This doctrine was very fully drawn out in *Ripley v. Wightman*, 4 McC. 447. COLCOCK, J., says: "If a man lease a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied." He places this upon the ground that "the title to the rent is founded on the presumption that the tenant enjoys the thing during the contract." The application of this privilege to the facts of that case involved the idea that in a lease of a dwelling-house, for the purpose of a residence, when the land that supports and adjoins the house is designated to be occupied only as accessory to such residence, the use of the house for that purpose is to be regarded as the proper subject-matter of the lease, and all other matters as incidental thereto; and also that the destruction of the house; to the extent of rendering it useless as a residence, is a substantial destruction of the subject-matter of the lease. We have here the distinction upon which the determinations of the courts of our State rest, which have been charged with carrying the law in a direction divergent from the proper course of the common law. It is involved in the question whether the actual physical destruction of the property, the usufruct of which was contemplated by the lease, is essential as ground for rescinding the lease, or whether the destruction of the possibility of an usufruct, such as was in contemplation of the parties to the lease, is sufficient ground for such rescission. It is very clear that the latter view has been judiciously settled in this State, and acquiesced in by both legislature and people for too many years to be disturbed at this time. It must be assumed that the relations of landlord and tenant, as they exist at this day throughout the State, have been constructed upon the idea of the law thus promulgated by the highest judicial authority of the State. It remains to be seen whether this view of the law

has not a higher sanction of authority and reason than the opposite doctrine.

The next case to be noticed was *Bacott v. Parnell*, 2 Bail. 424, which was decided on authority of *Ripley v. Wightman*. O'NEALL, J., says of *Ripley v. Wightman*: "In that case, the act of God was held a rescission of the contract." He applied the same rule in the same case before the court, holding that a contract for the hiring of a slave was ended by the death of the slave, that being the act of God. This same doctrine was again sanctioned in *Corley v. Klockley*, Dud. 35, and in *Wilder v. Richardsdon*, id. 323.

Before examining the merits of the position assumed by the courts of this State upon precedent and authority, it is important to ascertain whether this is in fact an open question under the English and American decisions.

As the doctrine above stated is applicable only to the case of a destruction of the premises by the act of God and the public enemies, it will be unnecessary to look into the great mass of cases, English and American, where the injury complained of arose from fire, either originating on the premises or adjoining them. Among the cases thus shut out of view are the following: *Belfour v. Weston*, 1 T. R. 310; *Monk v. Cooper*, 1 Ld. Raym. 1477, and 2 Strange, 763; *Baker v. Holtzapffel*, 4 Taunt. 45, and 18 Ves. 115; *Walton v. Waterhouse*, 3 Saund. 420; *Bullock v. Domitt*, 6 T. R. 650; *Ld. Chesterfield v. Bolton*, Com. Rep. 627; *Leeds v. Cheatham*, 1 Sim. 146; *Izou v. Gorton*, 35 Eng. C. L. 198; *Loft v. Dennis*, 102 id. 484; *Willard v. Tillman*, 19 Wend. 358; *Hallett v. Wylie*, 3 Johns. 44; *Graves v. Berdan*, 29 Barb. 100; S. C., 26 N. Y. 498; *Magaw v. Lambert*, 3 Penn. 444; *Fowler v. Bott*, 6 Mass. 63, and *Phillips v. Stevens*, 16 id. 238.

In all these cases it has been held that the destruction of leased premises by fire, occurring through accident or negligence, does not afford ground for relieving the tenant from the payment of rent. It is worthy of remark that in all these cases there is not one in which, so far as appears by the reports, the tenant put himself upon the distinctive ground of a right to rescind by an act of surrender. On the other hand, *Baker v. Holtzapffel* was decided on the ground that there had been no steps taken by the tenant in order to make a rescission effectual. These cases are strong authority for holding that, during the continuance of the lease, no abatement of rent can be claimed by reason of injury to the leased premises by

fire. It has been generally assumed, however, and perhaps not without reason, that their effort is to deny the right of the tenant to relief in any form in such cases.

It will not be necessary to inquire whether cases of the destruction of the subject-matter of the lease by negligent or accidental fire are distinguishable from, or stand as exceptions to, the rule that the destruction of the subject-matter of the lease by the act of God or the public enemies, works a dissolution of the lease at the election of the lessee. If it can only be regarded as an arbitrary exception, still strong reasons have been urged why relief should not be extended to such cases. Loss by fire is an ordinary risk that may fairly have been considered within the contemplation of the parties. The exercise of prudence and care, on the part of the tenant who has control of the premises during the lease, may avert the danger, or at least diminish its injurious consequences. To throw the consequences of the loss wholly on the lessor diminishes unduly the interest prompting the tenant to the exercise of that care due in his relation to his landlord, while an unscrupulous tenant, with a hard bargain, would find himself tempted to destroy the premises secretly, in order to escape the payment of rent. These considerations are unanswerable, when the fire originates upon the premises in the possession of the tenant.

To undertake, in such cases, to draw a line between accidental and negligent fires would be impracticable, from the nature of the cause of inquiry.

We may also exclude from consideration, in the present connection, a class of cases in which the relation of landlord and tenant has been modified by covenants to maintain, support and repair, and to surrender possession of the premises at the end of the term in an agreed condition. Of these, 1 Dyer, 23, is an instance. In that case one bound by his covenant to sustain and repair the banks of a water-course was held liable on his covenant for damage occurring through an extraordinary flood. In this case, although the defendant was a lessee, no question was made as to any diminished value of the leased premises; nor was any demand for rent involved.

Canal Nav. v. Pritchard, 6 T. R. 750; *Bullock v. Domitt*, 6 id. 650; *Lord Chesterfield v. Bolton*, Com. R. 627; *Arden v. Pullen*, 10 M. & W. 321; *Leeds v. Cheetham*, 1 Sim. 146, and *Phillips v. Stevens*, 16 Mass. 238, are all cases of this class. In all these cases the rights of the parties depended upon the force and effect of

covenants to repair, and, accordingly, they have no bearing on the question under immediate consideration.

Paradine v. Jane, Alleyn, 26; Sty. 47; and *Pollard v. Schaeffer*, 1 Dallas, 210, involve a somewhat similar principle, but do not touch the present question. In both of these cases the complaint was that the defendant had been deprived of the possession of the leased premises by an alien enemy, and not that the subject-matter of the lease had been destroyed. The thing leased remained in existence still, although the lessee had incurred the personal misfortune of losing the advantage he had anticipated from it.

Hart v. Windsor, 12 M. & W. 66; *Sutton v. Temple*, 12 id. 52, and *Smith v. Marrable*, 11 id. 5, are cases in the Exchequer at variance with themselves upon the question whether there is incident to a lease an implied covenant that the premises are fit for the purpose for which they were hired. In *Hart v. Windsor*, and *Sutton v. Temple*, the existence of such an implied covenant was denied, while in *Smith v. Marrable* the tenant was relieved on the ground of a breach of such implied covenant. It is true that *Hart v. Windsor* professes to overrule *Smith v. Marrable*. PARKE, B., who delivered the opinion of the court in both of these cases, says that the decision in *Smith v. Marrable* rested on *Edwards v. Etherington*, Ry. & M. 268, and 7 D. & R. 117; *Collins v. Barrow*, 1 M. & Rob. 112, and *Salisbury v. Marshall*, 4 Car. & P. 65, and that these cases were not law. Whether this sweeping overthrow met the approval of the King's Bench, whose decisions were involved, does not appear from any case brought to notice. In *Sutton v. Temple*, a different account is given by the same court of *Smith v. Marrable*. It is there said that the case in hand was distinguished from *Smith v. Marrable* on the ground that in the latter case the contract was a mixed one of land and chattels (a furnished house), and that, while there is such an implied contract in regard to chattels, there is none in the case of land. The report of the case (in 11 M. & W. 5) gives no such character to *Smith v. Marrable*. The lease, in the latter case, is set forth, making no mention of chattels of any description, and the question came before the court upon the charge of the chief baron to the jury to the effect "that, in point of law, every house must be taken to be let upon the implied condition that there was nothing about it so noxious as to render it uninhabitable." Standing by themselves, these cases in the Court of Exchequer are of unsettled authority; but their weight will be still

Coogan v. Parker.

more diminished when we come to look at *Edwards v. Etherington* and *Cowie v. Goodwin*, 35 Eng. C. L. 162. Whatever may be the merits of the controversy as to the implication of covenants of fitness, we are not required, at the present time, to hold the balances in its settlement—for the principle involved in these cases is clearly distinguishable from that which forms the ground of the doctrine that the destruction of the subject-matter of the lease by the act of God or the public enemies works a dissolution of the lease at the election of the tenant.

Edwards v. Etherington, and *Cowie v. Goodwin*, approach nearer to the question in hand. *Edwards v. Etherington*, 24 Eng. C. L. 437, also reported under the name of *Edwards v. Hetherington*, in 16 id. 272, was a case where the premises became uninhabitable during the term, as a consequence of natural decay. The tenant elected to rescind, and returned the key to the lessor. The court held that he was entitled to be relieved, as he had lost the beneficial use of the premises without fault on his part. *Cowie v. Goodwin*, 38 Eng. C. L. 162, 9 Car. & P. 378, involved the same principle and received the same solution.

It is apparent that if these cases possess authority, it tends to enlarge the doctrine stated above, and places a destruction of the habitable quality of a house by natural decay, without the fault of the tenant, on the same footing as if the cause of such injury was the act of God, or of the public enemies. *Arden v. Pullen*, 10 M. & W. 321, was, also, a case of decay, though alleged to have resulted from bad original construction; but the tenant had covenanted to repair, and that created a clear distinction from *Edwards v. Etherington*, and *Cowie v. Goodwin*.

Graves v. Berdan, 26 N. Y. 498; S. C., 29 Barb. 100, directly affirms the doctrine under immediate consideration. That was an action for rent of apartments in a building afterward destroyed by fire. EMOTT, J., whose opinion, delivered in the Supreme Court, received the direct sanction of the Court of Appeals, takes ground that where the estate is gone, and the thing demised no longer exists, no rent can any longer be recovered. He applies this to the case in hand, holding that the destruction of the apartments was the total destruction of the thing leased, and concluded that the tenant ought to be discharged from the payment of rent. This conclusion was sustained on appeal. The opinion in the Court of Appeals states: "That at common law, where the interest of the

Coogan v. Parker.

lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned." This was the ground on which the judgment in the case rested. It is true the opinion branched out into collateral matter, tending to narrow down the practical value of the rule ; but, so far as the case settled the law of New York, it carries it beyond the doctrine of the courts of this State, as stated above, by extending it beyond the act of God and the public enemies to one of accidental fire.

Cass v. Rudale, 2 Ves. 280, was not a case of landlord and tenant, but was a bill for a specific performance of a contract for the purchase of houses, where it appeared that, after suit brought, the houses were destroyed by an earthquake. The court decreed a specific performance. As the present question arises out of the peculiar contract that exists between landlord and tenant, *Cass v. Rudale* can throw no light upon it.

Taverner's case, 1 Dyer, 56, applied the principle in question, allowing the rent to be apportioned where there was a lease of land and sheep, and the sheep died during the term.

From the foregoing review of the authorities on which those rely who have affirmed that *Bayley v. Lawrence* and *Ripley v. Wightman* run counter to the course of the common law, it will be seen that, so far as it regards adjudicated cases, there is no conflict with the principle of these cases. It is true that, in some of these cases, expressions are employed inconsistent with the application of the principle that has been made in our courts ; but the consideration of these judicial views and opinions belongs to that part of our discussion which will take into account the state of authority.

Regarding, then, the question as an open one upon the adjudicated cases in England and this country, we will proceed to consider its merits more closely.

The question is two-fold :

1st. Where there is a substantial destruction of the subject-matter out of which rent is reserved by a lease for years, by an act of God, or of the public enemies, may the tenant elect to rescind the lease, and, on surrendering all benefit thereunder, may he be discharged from the payment of rent ?

2d. Whether the actual physical destruction of the property, the usufruct of which was contemplated by the lease, is essential to form a ground for rescinding the lease, or whether the destruction

Coogan v. Parker.

of the possibility of an usufruct, such as was contemplated by the parties to the lease, is sufficient ground for such rescission.

We believe it will be found that the better reason and the weight of authority lies on the side supporting the proposition advanced in the first question, just stated, as well as in the latter category of the second question, that the idea of mere physical destruction has never been prominent, and that the possibility of a beneficial enjoyment, according to the clear intent of the lease, has been made the test of the integrity of the lease. Rent is defined to be a certain yearly profit in money, provisions, chattels, or labor arising out of lands and tenements, in retribution for the use. 3 Kent's Com. 460.

This definition, with very little difference in the form of statement, and none in its import and effect, is generally agreed upon. The existence of rent, therefore, presupposes land, and a possible usufruct, for there can be no just demand for retribution or compensation for that which does not exist. An agreement to pay rent, whether a simple contract, or a covenant in form, is controlled by the nature of rent. If the conditions under which rent accrues do not exist, there is nothing for either an agreement or a covenant to pay rent to rest upon. A corresponding definition of a lease was given by Judge THOMPSON in the *United States v. Gratiot*, 14 Pet. 835. He says: "The legal understanding of a lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent." But the possession of land derives value only from its profits, immediate or prospective. The lessee for a short term ought to be regarded as contemplating immediate profits — the owner of the reversion as looking to prospective profits. The definition of rent, as we have seen, is based upon the idea of "yearly" or present profits. Where parties contract together in terms that import the relations expressed by the foregoing definitions, it is obvious that their contract ought to receive such a construction as to preserve the rights and equities lying at the foundation of such definitions. The equity of a contract is its life, springing out of the idea of a reciprocity of benefits and obligations. Hence, a contract, without a consideration, being wanting in the elements of equity, is void at law. When the equity of a contract is in harmony with its terms, it is enforced at law. A contract is the law of the parties — its equity is the reason of that

law, and it is not a mere figure of speech to say, that where the reason ceases the law ceases also.

On the other hand, the ordinary contract for the payment of money at a fixed time, or on a fixed contingency, must be defined in terms expressing quite a different intention. The consideration of a contract to pay money must be either a right or thing acquired, or an obligation capable, in intendment of law and by the process of law, of being turned into value. The consideration of a lease is not the possession alone of land, but possession with its profits. The lessor assumes no obligation that there shall be profits, nor can any process of law produce such profits. The basis of the consideration is, then, an expectation of profits; all that the lessee gets being a right to produce and take them if they exist. It may well be that the lessee takes all ordinary risks of loss. The real consideration is, therefore, in the nature of a power of limited control over the premises, and to take to his own use the profits. This power, to answer the ends of the lease, must be upheld during the term. It may be destroyed either by the act of the lessor or of one claiming under him or against him, by title paramount, or by the destruction of the subject-matter of the lease through some agency not embraced in the risk taken by the lessee.

In the first case, all are agreed that the tenant is entitled to relief. In the second case, the words "demise," or "let," or equivalent words, import a covenant of quiet enjoyment, under which the tenant *may* have relief. *Hart v. Windsor*, 12 M. & W. 66. Why is this covenant of quiet enjoyment implied by the law from the mere fact that the contract is one of letting? Clearly because the equity demands that the power of the lessee should be upheld when he has not taken the risk of its destruction. Unless, therefore, it can be shown that the lessee has taken, subject to the risk of destruction by the act of God and the public enemies, this principle should give him relief. It is claimed that where one covenants to perform an act, it is no ground of relief that the act became impossible through the act of God or the public enemies. *Walton v. Waterhouse*, 3 Saund. 422, note *a*. If, while the covenant to pay rent continues in force, this might be an answer to the claim that performance was prevented by an act of God or the public enemy, still the covenant is subsidiary to the lease, and if the lease falls, must fall with it, for the right to rent must precede the right to enforce the covenant. The present question can, therefore, receive

no solution from this principle applicable to covenants. The question, then, recurs, can the lessee, in the absence of a clear expression of such intent, be regarded as having assumed the risk of the destruction of the leased premises by the act of God or the public enemies? That such an event is to be regarded as extraordinary, and not generally to be considered as within the contemplation of parties in their ordinary dealings, must be admitted. On this question we are of opinion that the weight of authority, supported by many adjudicated cases, sustains the doctrine we have presented, and that no adjudicated case denies it, while the habits and customs of the people embrace it as one of the fixed ideas upon which their daily dealings are based.

According to Rolle's Abr. 939, possession of the leased premises by the king's enemies does not suspend the rent, and the reason assigned is, that by express agreement the lessee is bound to pay under all risks. The case here put does not imply a destruction of the subject-matter of the lease, but a mere interruption of the lessee's enjoyment of it. Again, it is said, that if part of the leased land is overflowed by fresh water, the rent does not cease, but if overflowed by the sea, the right to rent to such part is gone. The overflowing by fresh water is not regarded as inconsistent with a several enjoyment of the land, though changed in the character and value of its profits; but the sea makes all that it covers common; hence, in this case there is an actual destruction not physical — for the land still remains under the sea — but legal and beneficial. *Id.* 236. This is a distinct affirmance of the principle in question. *Taverner's case*, 1 Dyer, 56, is an instance of the application of the principle in question to a lease of land and sheep, when the sheep died. The arguments against the judgment which apportioned the rent were addressed against the doctrine under consideration, nor was any distinction attempted to be drawn between leases of land alone and mixed leases of land and chattels, as was afterward done in *Sutton v. Temple*.

It must, therefore, be regarded that the principle contended for met the approbation of the court. We have already seen that this principle was applied in *Edwards v. Etherington* and *Cowie v. Goodwin*, and in these cases carried beyond the limits contended for.

The note of a decision of Lord MANSFIELD, referred to by BULLER, J., in the case of *Belfour v. Weston*, 1 T. R. 312, has relation to

a case of burning by fire, in which case he says the landlord is not obliged to rebuild, but the tenant is obliged to pay rent during the whole term, has no bearing on the present question, as we have already seen. *Baker v. Holtzapffel*, 4 Taunt. 44, which was an action for use and occupation of premises destroyed by fire, Lord MANSFIELD put the decision upon the distinct ground that the defendant had made no offer to deliver up the premises. This case would lead to the conclusion that at that time it was not fully settled that a loss by fire conferred no right on the tenant to rescind. When the same parties came before Lord ELDON for equitable relief (18 Ves. 115), he disposed of the case on the ground that there was no relief in equity in such a case beyond what the law afforded. Lord NORTHINGTON, in *Brown v. Quiller*, Ambler, 619, says: "The justice of the case is so clear that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am surprised it should be looked upon as so clear a thing that there should be no defense to such an action at law." This was said of the burning of leased premises by fire, and although it may have been inapplicable to the case in hand, is no mean support to the more general position contended for.

It is said in the note, at page 422 of 3 Saund. (*Walton v. Waterhouse*), that if there is an express covenant to pay rent, tenant is bound to pay, though the premises be burnt or blown down. It is also said, in the same note, "and as it appears from the before-mentioned case of *Paradine v. Jane*, Alleyn, 26, that it is no plea, in such case, to an action of covenant for non-payment of rent to say that the house was destroyed by the king's enemies, or that the defendant was evicted and turned out of possession by them, so it is equally no reason to say that the house was burnt down, and, therefore, he is not bound to pay rent.

The doctrine contended for does not assume that the plea here stated to have been made in *Paradine v. Jane* would be good. It is not the destruction of the buildings on the leased land, whether by the act of God or the public enemy, that in itself constitutes the right to relief against the covenant to pay rent; but it is such a destruction as reaches to the subject-matter of the lease, or the thing that must be regarded as the consideration of the agreement to pay rent, that authorizes the tenant to elect to rescind, and it is only when this doctrine is made effectual, by the appropriate act

of the tenant, that a bar to the action of the covenant is complete, which goes to the existence of the covenant. It is undoubtedly correct to say that blowing down, when caused by a tempest, stands on the same footing as destruction by public enemies ; but the consequences of this admission are not necessarily such as were drawn by the learned reporter, whose language is here given.

It will be useful to notice the remarks made by TINDAL, J., in *Izou v. Gorton*, 5 Bing. N. C. 501, that "the cases referred to in the argument, in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself." This was said in a case of destruction by fire of leased apartments subsequently repaired by the landlord, who brought his action for rent, and was allowed to recover. TINDAL cites *Baker v. Holtzapffel* as decisive of the question, which decision, as has been already stated, rested on the fact that the tenant had not offered to surrender the lease. This citation is followed by the language quoted above, which goes beyond the necessities of the case, to intimate that there was no ground for a surrender in the case in hand. That the cases referred to by TINDAL are not those that have been regarded as the leading cases on this subject, is evident, from the fact that none of them answers the description given by him. By confining • this remark of TINDAL to cases of destruction by fire, the case then in hand, it will escape the criticism of inaccuracy to which, upon any other construction, it would be subject.

In *Taverner's* case there appears to have been a struggle between the inclinations of the common lawyers to dispose of such cases by an arbitrary rule, recommended by its simplicity and convenience of application, on the one hand, and the force of the inherent equity and justice of the claim of apportionment on the other hand, in which the latter prevailed. This is one of the cases to which TINDAL ought not to be regarded as having referred in the language quoted above.

The enlightened spirit in which the jurists, both of the common and civil law, have dealt with this question, is set forth by Chancellor WALWORTH in *Gates v. Green*, 4 Paige, 355. He lays it down as a principle of natural law, "that a tenant, who rents a

house or other tenement for a short period, and with a view to no other benefit except that which may be derived from its actual use, should not be compelled to pay rent any longer than the tenement is capable of being used." He cites to the proposition the law of Scotland, the Code Napoleon, the law of Louisiana and New Foundland. He also cites the authority of Puffendorf as supporting that view. He makes this judicious comment on Rutherford's Institutes, 127: "Rutherford, in his lectures on natural law, makes a very sensible distinction between a casualty which destroys the value of the use of the property, which loss naturally falls on the lessee, and one which destroys the property itself; in which latter case he holds that the lessee is excused from the payment of further rent." If, instead of reading "property," we read "subject-matter of the lease," we will not change the sense of the terms employed. It would be an unwarrantable use of the word "property" to confine the idea conveyed by it to the land on which a building stands when the building communicates to the lease almost the entire value and interest covered by the word "property." After referring to the efforts of some of the chancellors of England "to introduce this principle of natural law into the administration of justice in their courts," Chancellor WALWORTH adds: "A contrary principle, however, finally prevailed in the equity courts of England, as well as in the courts of common law, and it must now be considered as settled, both in England and in this State (New York), that a lessee of premises, which are burned, has no relief against an express covenant to pay rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild." It is obvious that the learned chancellor had in view the case of destruction by fire alone, as the case before him was of that class, and his statement of the point decided is in terms confined to destruction from that cause. The strength of his conviction, as to the inherent justice of this proposition advanced by him, is an assurance that, if called upon to do so, he would have restricted the decisions referred to, to the exact point decided, and, in doing so, would have left unaffected the principle of natural law in its application to cases of destruction from the act of God and the public enemies.

It was this view that Judge COLCOCK took in deciding *Ripley v. Wightman*, and to which he cites the support of 6 Bacon, 50.

A more critical notice of the New York decisions is rendered

Coogan v. Parker.

important by the fact that the authority of Chancellor KENT is cited against the doctrine here contended for. That learned Chancellor says, 3 Kent's Com. 466: "It is well settled that, upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from his obligation to pay rent." If by the loss of the premises is meant only that which Rutherford describes as the "loss of the value of the use of the property" to the lessee, then this authority is reconcilable with all that has here been said on this subject. If, on the other hand, we read the passage from Kent as saying that the destruction of the subject-matter of the lease is not, under any circumstances, ground for rescission, then we involve the learned commentator in the inaccuracy of not being supported by the authorities on which he relies. The judicious character of his mind must convince us that he employed these words in the exact sense in which they stand; in which case he would be read as saying that it is no ground of relief for the tenant that he has lost the benefit that he contemplated in leasing the premises. Nor would the addition of the words "by fire, inundation or external violence," compel an alteration of this reading; for it is possible for a tenant to lose the benefit of leased premises from either of these causes without there being such a destruction of the subject-matter of the lease as to warrant a rescission.

In *Hallett v. Wylie*, 3 Johns. 44, a case of injury by fire, Judge VAN NESS states, "that there is no case in the books where the destruction of the premises by fire has been held to excuse the tenant from the payment of the rent in an express covenant." He goes on to state that every reservation of rent in a lease is to be regarded as having the effect of a covenant. It was on the ground peculiar to cases of loss by fire that this case was decided. We have already referred to *Willard v. Tillman*, 19 Wend. 358, a case of fire also, in which the decision of the court is put on still narrower grounds, namely, that the lease embraced a strip of land capable of beneficial use, independently of the building burned, and that the tenant, from all that appeared, might still be in possession and use of that land. The plea in that case was held bad, as it went against the whole demand for rent. This case shows at least a disinclination to re-affirm broadly the doctrine put forth in *Hallett v. Wylie*. *Gates v. Green* we have already alluded to as having elicited the views of WALWORTH, Chancellor. In *Graves v. Berdan*,

26 N. Y. 498, also alluded to above, is an authority that where the lease is of apartments alone, their destruction by fire is ground of rescission. In the opinion of Judge EMOTT, in the Supreme Court, 29 Barb. 100, it is said that if there is an express covenant to pay rent in a lease of lands, neither the destruction of buildings by fire, nor the inundation of the property by water, nor its occupation by the enemy, will exempt the party from his obligation. This is evidently an incorrect rendering of the passage above quoted from Kent, and is not supported, as broadly stated, by the authorities cited in its behalf. This inexactness did not escape the attention of the Court of Appeals, for the opinion in the latter court, after sanctioning the conclusions of Judge EMOTT, is careful to say that "it may be added, that at common law, when the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned." The ground upon which this case was decided was, that the lessee of apartments in a building occupied in part by others takes no interest in the soil, and, consequently, the destruction of the building would be the total destruction of the thing leased. It is said that it would be otherwise if the tenant had leased the entire building; for in that case the land would be left, and, in respect of that, he would have to pay rent. It will not be necessary to consider whether the reasons given for this decision are the best that could be given. It would, at all events, reduce apartments in a house, as the subject of letting, to a condition expressed accurately neither by the term "real" nor "chattel." It would be something less than an easement, although it was assumed that the easement of going upon the land to and fro in the use of the apartments would accompany it as an incident. It would also involve the idea that a lessee of the whole building would have rights and liabilities of a class different from that of the aggregate of all the tenants of its separate apartments under several leases. See *Kerr v. Merchants' Exchange*, 2 Edw. Ch. 315, and *Izon v. Gorton*, 35 E. C. L. 198. The real difficulty in *Graves v. Berdan* was in reconciling the right of a tenant of apartments destroyed by fire to escape the payment of rent, while the rule was upheld by the courts of England and New York, that a tenant living in an entire building was not relievable in case of loss from the same cause.

With the settlement of this question we have nothing to do at

Coogan v. Parker.

the present time, while the general course of the case, and the pointed concessions of the Court of Appeals, sustains the general doctrine we are attempting to elucidate.

In *Fowler v. Bott*, 6 Mass. 63, Judge SEWALL says that a lease for years is a sale of the premises for a term. That, unless there is an express stipulation, lessor does not insure the premises against "inevitable accident, or any other deterioration." He also says: "The rent is, in effect, the price or purchase-money to be paid for ownership of the premises, during the term, and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser." Again, he says that, independent of some covenant, the destruction or injury of the premises by fire, "or any other casualty," is the misfortune of the lessee, and he is not excused from paying his rent. The attempt here made to assimilate a case of sale and one of hiring, as to all their incidents and consequences, seems not only unnecessary, but liable to be carried out into consequences calculated to destroy the common-law idea of the relation of landlord and tenant. Judge EVANS, in *Corley v. Kleckley*, Dud. 35, made, it is conceived, a more judicious use of the points of similarity between these two transactions, when he traced the same consequences to both, as it regarded the question of what condition of unsoundness, at the time of the contract, would warrant its rescission. This is as far as it appears safe to run the parallel. The statement placing "any other casualty" on the same footing with fire, while not essential to Judge SEWALL's argument, needs to be subjected to a more careful limitation, in order to bring it within the decided cases of England, as we have already seen.

Unless something of importance has been overlooked in the foregoing citations, it cannot be doubted that, in case of substantial destruction of the subject-matter of the lease, the tenant is entitled to rescind.

What, then, should be regarded as a substantial destruction? It is said, in *Doe ex dem. Freeland v. Burt*, 1 T. R. 701, by ASHURST, J., that "the construction of all deeds must be made with reference to the subject-matter, and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country." In that case, a lease of a yard to a tenant of apartments was held not to carry with it vaults underneath the

yard, notwithstanding the principle of the common law, that the ownership of the soil carried all above and below it. The ground of this decision was, that, construing the lease by its subject-matter, it was obvious that the parties intended otherwise.

This principle is directly applicable. If parties contract with reference to the occupation of a dwelling-house, the destruction of that dwelling-house is clearly the destruction of that which they had in view, and was the basis and consideration of their contract. To say that the few feet of barren land on which it stood, incapable of any production worthy of consideration, is sufficient to answer the intention of the parties, to satisfy the justice and equity of the contract, as well as its terms, is to say what no jurist has yet ventured broadly to affirm. The only difference between leases in compactly built cities and in the country is, that, in the one case, the principle is more clear and evident in its application than in the other. The ground of distinction must be the fact that the structure bears such relation, in point of fitness and value for the use contemplated by the lease, as to give rise to the conclusion that the buildings were the main element of the consideration on which the agreement to pay rent was based. Such a conclusion is in accord with the sense of justice by which the mass of the people are influenced; and one reason why questions of this character are, after all, so few in number among the reported cases, is, that the sense of justice has influenced the public mind to such an extent as to bring them to a reasonable solution without an appeal to the courts.

It has long been felt that the application of the common law ought to yield results more in accordance with the habits and ideas of the people, in this respect, and it is apprehended that, if approached in a constructive as well as a critical spirit, its doctrines and principles will be found, in all respects, compatible with the growth and tendencies of the civilization which has been fostered by it.

The present action is for rent upon a lease, for seven years, of premises consisting of a building in the lower part of the city of Charleston, to be used as a restaurant, the lease containing a covenant to repair. The defendant, upon the trial, offered to prove that he was prevented, by the casualties of war, from using the premises for the purposes contemplated by the lease; also, that the building was so injured, by the same cause, as to be rendered uninhabitable; and, also, that the military forces of the United States

Redding v. South Carolina Railroad Co.

took possession of the premises. This evidence was excluded by the circuit judge, and a verdict rendered for the plaintiff. It, however, appeared that the defendant regained possession by an arrangement with the commandant of the military force, and retained possession after the cessation of hostilities until the termination of the lease.

It is not necessary to inquire whether sufficient ground existed for a rescission, for it does not appear that the defendant took any measures to rescind the lease. It is said, in behalf of the defendant, that the possession of the premises, subsequent to the military occupation, ought to be ascribed to the consent of the military authority, and not to be considered as a holding under the lease. If, under any circumstances, a hostile military occupancy could operate to extinguish the lease, still it would be necessary for the defendant to make it appear that such occupation was *in invitum*. For aught that appears, the defendant may have abandoned the premises, without sufficient cause, to the military force.

It is sufficient for the purposes of the present case to hold that the defendant, not having established a rescission of the lease, has shown no sufficient bar to the plaintiffs' demand.

The motion for a new trial must be denied.

MOSES, C. J., and WRIGHT, J., concurred.

REDDING V. SOUTH CAROLINA RAILROAD COMPANY.

(S. C. L.)

Master and servant — master liable for torts of servant.

A master is responsible in a civil action for the tortious act of his servant committed in the course of the latter's employment, and it makes no difference that the act was done willfully and without the knowledge of the master, or even in disobedience of his orders.

Whether a servant was acting in the course of his employment when he committed a tortious act is a question of fact.

ACTION by William F. Redding and Julia D. Redding, his wife, to recover damages for injuries to the person of the female plaintiff, alleged to have been committed by a servant of the

Redding v. South Carolina Railroad Co.

defendant at the depot of the defendant, in the city of Charleston, on the 26th February, 1870.

Mrs. Redding, the female plaintiff, Eliza Brown and Pharaoh Delair were examined as witnesses for the plaintiffs, and each of them testified, in substance: That while Mrs. Julia D. Redding was sitting in the ladies' parlor of the South Carolina Railroad Company Depot, at Charleston, in the said county, on the ——— day of February, 1870, a man, Charles Wollen (who, being present in court, was identified by the witnesses), approached Mrs. Redding, told her she was a negro; that he was instructed by the South Carolina Railroad Company to keep negroes out of that parlor; and, upon her refusal to leave the parlor, seized her and dragged her out, throwing her with violence to the floor upon her face (she being then pregnant), thereby injuring her.

Mrs. Redding also testified that one month previously the same man, Charles Wollen, ordered her out of the same parlor, telling her he was ordered by the company to keep negroes out of that parlor. Upon her saying she was not a negro, he apologized and left her. Mrs. Redding also testified that she rode in the first-class car, and, although without a ticket, and without paying any fare, was allowed to continue to her journey's end.

J. B. Martin was then called by plaintiffs. He testified as follows: I am ticket agent at the South Carolina railroad; was so in February last. One Wollen was employed as a man "knocking about" the depot. The first thing I employed him for was to attend the ladies' room, to clean it out. He was so employed in February. I do not remember the exact time of this occurrence. I discharged him, I presume, about two or three months after this occurrence. I gave no instructions to keep colored persons out of the parlors, and there were none at that time. That ceased to be as soon as the civil rights bill had passed. I don't know when this bill was passed, but it was before this. We never interfered with colored persons going in there.

Wollen's employment was, as we had no stewardess for the ladies' room, to keep it clean, sweep it out, and empty the chambers, and such things. That was the only employment he had, and the only authority. I am in charge of the whole premises. After the passage of the civil rights bill, the orders were to make no distinction at all. Persons went in there as they pleased.

There is a passage here through the building. On the right hand

Bedding v. South Carolina Railroad Co.

side is the ladies' room, and my office is on the left. I cannot see into the ladies' room from my office. The ticket-window is all of twenty-five feet from the door of the ladies' room. I have never measured it. Mrs. Redding came to the window that night. She told me that she was ordered out of the ladies' room. I said it was without my knowledge or consent. I saw nothing more of her. There was a gentleman standing there. The first intimation I had of it was, he said that he would shoot my watchman. I asked him why? He then said that his foster sister had been ordered out of that room. I told him that it was done without my knowledge or consent. It was not my orders. Nothing was said by Mrs. Redding, or anybody with her, with regard to any violence. She said she was ordered out. No complaint was made to me of violence. She said she had been in there several times before, and had not been ordered out. I know that she has been in there and nobody disturbed her. From the window she went to the cars. At no time that night was any complaint made by her or anybody about any violence.

The plaintiffs here rested, and the defendant moved for a nonsuit, on the grounds :

That Charles Wollen was not acting within the scope of any employment or agency, direct or indirect, when he excluded plaintiff from the saloon, but was acting without authority, beyond his legitimate employment, and in violation of the instructions and wishes of the defendant, extended to its proper agents ; and that, upon the testimony, the act was the tort of Charles Wollen, for which he is responsible, and not the company.

The motion was granted.

The plaintiffs appealed to this court, on the grounds :

1. That the defendants are liable, notwithstanding that the servant acted contrary to their instructions, if he acted as their servant.
2. That the servant was acting in the course of his employment.
3. That whether the servant was acting in the course of his employment, was a question of fact, and should have been submitted to the jury to decide.

Chamberlain, Seabrook & Dunbar, for appellants. 1. If Wollen was at the time acting as the servant of the respondents, but acted in violation of their orders, the respondents are unquestionably liable for his acts, unless they are shown to be willful or malicious.

Bedding v. South Carolina Railroad Co.

2. The evidence shows that Wollen was at the time in the course of his employment, and hence the respondents are liable, in the absence of any evidence tending to show that he acted willfully or maliciously.

3. The question whether Wollen was at the time in the course of his employment is a mixed question of law and fact. It was not competent for his honor, the circuit judge, to pass upon the question, but it should have been submitted to the jury under proper instructions as to the matters of law involved.

They cited upon the first point, *Story on Agency*, § 452; *McManus v. Crickett*, 1 East, 106; *Middleton v. Fowler*, Salk. 282; *Wright v. Wilcox*, 19 Wend. 343; *Richm. Turnp. Co. v. Vanderbilt*, 2 Com. 479; *Joel v. Morrisson*, 6 C. & P. 511; *Sleath v. Wilson*, 9 id. 607; *Parkerson v. Wightman*, 4 Strobb. 363; *Weed v. The Panama R. R. Co.*, 17 N. Y. 362; *Story on Bailm.*, §§ 400, 406; *Stokes v. Saltonstall*, 13 Pet. 181; *Shearm. & Redf. on Neg.* 79; *Limpus v. London Omnibus Co.*, 4 Hurl. & C. 526; *The Phil. & Read. R. Co. v. Derbu*, 14 How. 483. Upon the second point, 1 Redf. on Rail. 383, 512-13, notes, 3d ed.; *Phil. Railway v. Witt*, 4 Whart. 143. And upon the third point, *Parks v. Ross*, 11 How. 393; *Richardson v. City of Boston*, 19 id. 268-9; *Brown v. Frost*, 2 Bay, 126; *Hopkins v. DeGraffenreid*, id. 441; 2 Bail. 321⁴; *Magrath v. Isaacs*, 2 McC. 23; *Clements v. Benjamin*, 12 Johns. 299; *Pratt v. Hull*, 13 id. 334; *Keller v. The N. Y. Cent. R. R. Co.*, 24 How. Pr. 172.

Conner, contra. The general rule of law is, that the principal is liable for the acts of his agent, *in the course of his employment*; but the rule and the limitation of it go together. The act complained of must be within the scope of the employment within the agency. *Story on Agency*, § 456.

The principal is not liable for the torts or negligence of his agent, in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use or benefit. *Story on Agency*, § 446; *McManus v. Crickett*, 1 East, 106.

The fact that the servant was, at the time of the injury, engaged in the service of his master is not conclusive of the master's liability. The act causing the injury must have been one within the scope of the authority which the servant had from the master, or

Redding v. South Carolina Railroad Co.

which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have. Shearm. & Redf. on Neg. 70.

The language of KENYON, C. J., in *Ellis v. Turner*, is apposite: The defendants are responsible for the acts of their servant in those things that respect his duty under them, but are not responsible for his misconduct in those things that do not respect his duty to them, as if he were to commit assault upon a third person in the course of his voyage. 8 Term, 533. And to the same point is *McClanahan v. Brock*: "How can an act of one of the defendant's servants, outside of his employment, and in no way connected with it, be considered as the neglect of his bailment?" And the nonsuit was sustained. 5 Rich. 27; *Eastern Counties R. R. Co. v. Broom*, 2 Eng. Law & Equity, 406; *Crocker v. New London & Willimantic R. R. Co.*, 24 Conn. 265; *Thames Steamboat Co. v. Housatonic R. R. Co.*, id. 56.

"It is objected that the defendants are not answerable for the tortious acts of their agents or servants, and this is true, if the acts were accompanied with force, for which an action *vi et armis* would lie, or were willfully done. But the acts complained of were not so done." *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick. 24.

ALDERSON, J., in *McKenzie v. McLeod*, 10 Bingh. 390; 25 E. C. L. R. 187. When the master "has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice, or common sense, the master can be held responsible."

WRIGHT, J. The action was brought by Redding and wife, the plaintiffs, to recover damages for an injury sustained by the wife in the passenger saloon of the defendant. The facts of the case are as follows: While the wife, on the evening of February, 1870, was sitting at the depot of the defendant in Charleston, in the parlor assigned for lady passengers, awaiting the departure of the train for Columbia, which she proposed to take, one Wollen, assuming to have charge of the said room, as the servant of the defendant, informed her that he was instructed to keep negroes out of that parlor; and, on her refusal to leave, he seized and dragged her out with violence — throwing her on her face to the floor. About a month before, the same man had ordered her out of the parlor, saying that his instructions were to keep negroes out; and,

on being told by her that she was not a negro, he apologized, and further interference ceased. Martin, who had charge of the premises constituting the depot, testified: "That the first thing Wollen was employed for was to attend the ladies' room, to keep it clean, sweep it out, empty the chambers, and such things; that this was his only employment; and orders had, before that time, been given to make no distinction at all" — meaning between white and colored persons. Wollen was discharged two or three months after the occurrence. Upon the plaintiffs' closing, the defendant moved for a nonsuit, on the grounds: "That Charles Wollen was not acting within the scope of any employment or agency, direct or indirect, when he excluded plaintiff from the saloon, but was acting without authority, beyond his legitimate employment, and in violation of the instructions and wishes of the defendant extended to its proper agents; and that, upon the testimony, the act was the tort of Charles Wollen, for which he is responsible, and not the company."

The motion was granted, and the plaintiffs seek, by appeal to this court, to reverse it. The relation of master and servant creates rights and obligations which are well defined in the books, not only as between themselves, but as between themselves and third persons. Perhaps, in regard to those last, they are no better or more distinctly stated than in Smith on Master and Servant, 151-2:

"A master is ordinarily liable to answer in a civil suit for the tortious or wrongful act of his servant, if those acts are done in the course of his employment in his master's service. The maxim applicable to such cases being *respondeat superior*, and that before alluded to, *qui facit per alium facit per se*. This rule, with some few exceptions, is of universal application, whether the act of the servant be one of omission or commission; whether negligent, fraudulent or deceitful; or, even if it be an act of positive malfeasance or misconduct, *if it be done in the course of his employment*, his master is responsible for it *civiliter*, to third persons; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect; for, even if he disapproved of, or forbade it, he is equally liable, if the act be done in the course of the servant's employment."

It would be a difficult undertaking to adduce a single case where the master was not held bound for the tortious acts of his servant,

Redding v. South Carolina Railroad Co.

done in the course of his employment. That it was not authorized, or even if it had been forbidden, does not affect the right of redress against the master by a party injured by the unauthorized or forbidden act, for the consequence to the third party is the same, and is to be attributed to the fact that the master has placed the servant in a position where he may do unauthorized acts. On what principle of fairness could it be contended that either the error or folly of employing an incompetent or careless servant should bring damage to a stranger, while the master, who put him in a position where he might commit the wrong, should be free from all obligation to respond to the injury? The appointment of such improper person by the master induced the wrong, and if it was committed in the course of his employment, that is, while the relation of master and servant actually existed in the particular service in the discharge of which the servant was engaged, the master is held to answer. He cannot be excused because he did not know of it or disproved of it, or even had forbidden it, for, notwithstanding his conviction of the impropriety of the act, as shown by his forbidding it, he nevertheless was so careless and negligent, in the selection of his agent, as to subject the public to the chance of its infliction.

To confine the liability of the master only to such acts of his servant, in the course of his employment, as he may have authorized, would give to an irresponsible agent a license to commit torts against the persons of those who, by the nature of his employment, must be brought in contact with him, without any reasonable prospect of pecuniary redress, and would materially affect the subordination of the servant so necessary to the maintenance of the superior condition which the master holds in relation to him. When the community deal with a corporation of the character of this defendant, with diversified departments, and various branches of business incident to the general purpose of its organization, "public policy and convenience" require that they should be responsible for the acts of commission or omission by their agents while in the course of their employment. The Supreme Court of the United States, in *Philadelphia & Reading Railroad Company v. Derby*, 14 How. 486, has affirmed the principles which we think applicable to this case, and, though not necessarily binding on this court, yet the clear statement of the law in the opinion, having in view the reason on which it rests, and the authorities to which it refers,

recommends it to our adoption. It was there held that "the master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the master's orders." The "course of the employment," in the sense in which it is used in regard to the duties imposed by the particular service, is not to be understood as restricted and confined to the prescribed duties set apart for the performance of the servant. Whatever may be incident to the employment must necessarily belong to it. "To attend the ladies' room" (as Martin, in his examination in chief, says, was the duty for which Wollen was employed), might imply that he was to take charge of it, or at least, to see to the seating and comfort of passengers who might enter; and this would further imply the duty of putting out improper or disorderly persons, and of preventing entrance to an intruder. If, by error of judgment, he should forcibly and violently eject a party who had a right to be there, or, in like manner, prevent admission to one entitled to enter, would the defendant be excused upon the ground that he was not acting within the scope of his service? Lord Chancellor CRANWORTH, in *Marshall v. Stewart* (House of Lords), 33 Eng. L. & E. 7, says: "We must take a great latitude in the construction of what is being engaged in his employment." That the act was willful, on the part of the servant, is no excuse for the master, if done within the course of his employment.

It was so held, in *Philadelphia & Reading Railroad Company v. Derby*; in *Weed v. Panama Railroad Company*, 17 N. Y. 362; in *Limpus v. London Omnibus Company*, 1 Hurlst. & Colt. 562; and in *Seymour v. Greenwood*, 7 Hurlst. & Norm. 354.

Every act is willful which is the result of volition. The principle proceeds upon the ground that the injury, by reason of the willful act, is to be attributed to the negligence and want of care of the master, in the selection of an improper servant, for a particular charge. There is a class of cases where the act of the servant was held not only willful, but malicious, or done to serve some purpose of his own, and the master was excused from liability. They are put upon the ground that the servant was then acting out of the line of his employment. As in *McManus v. Crickett*, 1 East, 107, where the servant, in driving his master's chariot, from malice, ran it against the chaise of the plaintiff, in which he was

Redding v. South Carolina Railroad Co.

riding, and from which he was thrown and greatly hurt. KENYON, C. J., delivering the opinion of the court, said:

"Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority *given* him, and, according to the doctrine of Lord HOLT, his master will not be held answerable for such acts." In *Sleath v. Wilson*, 9 Carr. & Payne, 607; WILDE, Serjt., in his argument, said: "The case of *McManus v. Crickett* is quite a different case; there the servant had a spite against the officer, and drove against him." ERSKINE, J., said: "It is quite a different case."

It would seem from the ruling in *Seymour v. Greenleaf*, 7 Hurlst. & Norm. 335, that the English courts had, to some extent, modified the views expressed in *McManus v. Crickett*.

If, then, the issue between the parties before us was to be determined by the fact that Wollen was, or was not, acting in the course of his employment, the solution of it was not for the court, but for the jury. What was included in the course of his employment; what acts or duties the particular service demanded of him; what control he was authorized to exercise over the passengers waiting in the parlor; how far did his particular employment, "to attend the room, to keep it clean, sweep it out," etc., give him a right to interfere at all with passengers within it; whether, having been in the room a month before the transaction, a hired servant, exercising the same authority as on this occasion, so far as ordering the plaintiff from the parlor, saying he was ordered by the company to keep negroes out of it; all these were circumstances from which the jury was to determine whether Wollen was, in the particular transaction, "in the course of his employment," after being instructed by the court as to what, in legal contemplation, was understood by the term. When, however, the judge assumed to decide that "Wollen was not acting within the scope of any engagement or agency, direct or indirect, when he excluded the plaintiff from the saloon, but was acting without authority, beyond his legitimate employment, and in violation of the instructions and wishes of the defendant, extended to its proper agents, and that, upon the testimony, the act was the tort of Charles Wollen, for which he is responsible, and not the company," he undertook to decide an issue which properly belonged to the jury.

If there had been no evidence to sustain the plaintiff's com

Welsh v. Davis.

plaint, it would have been within the legitimate province of the judge to have said so, and to order the nonsuit.

Who, however, can read the testimony, and say that, under no proper view which the jury could take of it, could they have differed from his conclusion? Our courts have not been inclined to grant nonsuits where there was any evidence offered by the plaintiff which might sustain his action. Where there has been a total failure of testimony, as in *Brown v. Frost*, 2 Bay, 126, and *Hopkins v. DeGraffenreid*, id. 241, there was nothing to leave to the jury, and it was the duty of the judge to nonsuit; but, as is said in *Rogers v. Madden*, 2 Bail. 321, the practice of "ordering a nonsuit *in invitum*, for defective testimony, is to be pursued with caution. If a plaintiff has any *prima facie* testimony, he has the right to the verdict of a jury upon it."

The motion is granted, and the order set aside.

MOSES, C. J., concurred.

WILLARD, J., concurred in the conclusion.

WELSH V. DAVIS.

(22 C. 112.)

Warranty — on sale by assignee for benefit of creditors.

An assignment for the benefit of creditors, giving the assignee power to sell the real estate "at such time, in such manner, and upon such terms as he may deem expedient and prudent," does not give the assignee power to bind the assigned estate by an express covenant of warranty; nor does such power exist by implication of law.

A purchaser of real estate, from an assignee for the benefit of creditors, with covenant of warranty, has no equity to subject the assigned estate to a claim arising from a breach of the covenant.

PETITION against administrators. Cureton and Hasseltine were joint owners of a lot in the town of Lancaster, under a conveyance from Massey. On March 19, 1860, Cureton made

Welsh v. Davis.

an assignment of his estate for the benefit of his creditors, to Cunningham as trustee, the assignment containing a power authorizing the trustee to sell the real estate "at such time consistent with reasonable dispatch, and in such manner and upon such terms as he may deem expedient and prudent." On January 3, 1861, Hasseltine, in his own right, and Cunningham, as assignee, joined in a sale of the lot of John R. Welsh, the plaintiff. Their deed of conveyance contained the usual covenant of warranty. Cunningham died, and in the year 1868 John A. Davis, the defendant, was substituted by the court of equity as trustee of the assigned estate. Massey also died in the year 1867, and in April of that year his widow filed her bill in equity against Welsh, claiming dower in the lot. The claim was established, and in June, 1868, she obtained a decree against Welsh for \$370.72, inclusive of costs, which he paid. Hasseltine was adjudged bankrupt, on his own petition, and was afterward discharged in bankruptcy. On January 17, 1870, Welsh filed this petition against Davis, Hasseltine, and Kibler, as administrator of Cunningham, wherein he claimed that the \$370.72, paid by him to the widow of Massey, in lieu of dower, should, with interest thereon, be refunded to him out of the assigned estate, in the hands of Davis.

The case was referred to a referee, who made his report, recommending that the petitioner be paid the amount of his claim, with interest, out of the assigned estate.

Davis filed exceptions to the report, as follows :

1. Because Cunningham could not, by his covenant of warranty, bind the assigned estate of Cureton.
2. Because the covenant of warranty could not extend to the rents of the lot, and the referee erred in charging the same against the defendant.
3. Because the referee erred in charging the defendant with the costs of the dower suit.

His honor overruled the exceptions, and made a decree confirming the report.

Davis appealed, on the ground that his honor erred in overruling the exceptions.

Moore, for appellant.

Allison, *contra*.

WILLARD, J. The appellant was appointed by the court of equity trustee of an estate, assigned for the benefit of creditors, upon the death of the assignee. Respondent makes a demand against the assigned estate, on the ground, that under a sale, made by the assignee, of real estate, part of such assigned estate, respondent became a purchaser; that the assignee gave a deed, with a covenant of warranty, and that respondent has sustained damages through a breach of such covenant.

The case, as presented by respondent's argument, involved two questions: First, had the assignee power to bind the assigned estate by a covenant of warranty? Second, is a covenant of warranty to be implied from the fact of a sale and consideration paid?

It does not appear that the assignment, in express terms, conferred upon the assignee power to bind the estate by a covenant of warranty. If, then, he had such power, it must be made out by implication, based either upon the general terms and expressions of the assignment, or upon the nature of the power of an assignee for the benefit of creditors.

It has been urged that the terms of the assignment embrace such authority. The assignment authorizes the assignee to sell, "in such manner, and upon such terms, as he may deem expedient and prudent." The effect of these expressions is to give to the assignee an unrestricted power of sale. It is contended that a collateral warranty is fairly within the sense of the expression "terms of sale." Taken in an enlarged sense, this might be correct, but the nature and object of the instrument operates to limit the expression to a strict sense, which is satisfied by allowing to the assignee control over the consideration and conditions on which the sale is made. Respondent contends that such authority is necessarily involved in the unrestricted power of sale conferred on the assignee. It is said that a power without restriction to sell and convey real estate, gives authority to an agent to execute deeds, with general warranty binding the principal. This proposition is derived from the relation of principal and agent, where that relation exists in its simplest character, namely, where the title, the beneficial interest, and the power of ratification and revocation unite in the principal, and the agent acts solely as the hand of the principal. Such a relation does not exist in the present case. The assignment vested the title in the assignee, and the beneficial interest in the creditors, leaving in the assignor nothing but a resulting trust, should assets remain after

the trusts are satisfied. If, then, the proposition advanced is applicable to the case in hand, it must rest on some other ground than that of a similarity between the relations involved in the two cases.

No such implication arises from the nature of the power of sale, for it is capable of being fully executed without the aid of a covenant of warranty. The covenant of warranty may, by possibility, make the sale more productive, but adds nothing to its completeness.

Neither does the object of the power of sale, in the case of an assignment for the benefit of creditors, furnish any ground for such an implication. The object of the assignment is to satisfy the demands of the creditors, by a voluntary surrender of that which, it must be assumed, might by process of law be subjected to such demands. For this purpose power is lodged in the hands of the assignee to convert the assigned assets into a form suitable for distribution, and to make distribution among the beneficiaries. It is obvious that no authority should be implied tending to defeat or embarrass the accomplishment of this object, and it is equally clear that such authority as the respondent contends for would have that effect. It would, perhaps, enable the assignor to realize a larger sum from the sale of the assigned estate applicable to the discharge of his debts, but at the expense of his creditors, who might thereby be subjected to unreasonable delay, and exposed to litigation and expense. It is said that it would inure to the benefit of creditors, by increasing the distributable fund; but the same end may be obtained under orders in equity (*Rogers v. Hunt*, 6 Rich. Eq. 361), without resort to an implication that would place in the hands of the assignee authority limited only by his discretion and prudence.

The state of relations, as created by the assignment, between the assignor, the assignee, and the creditors, precludes the application to the case of the principle contended for. In the case of principal and agent, the effect of its application is that a covenant is created in the name of, and for the benefit of, the principal, but no lien or charge arises affecting the proceeds of sale in the hands of the agent, in order specifically to subject them to any claim for damages for a breach of the warranty. Yet this is the effect claimed as the result of applying that principle to the case in hand. It is not enough for the respondent to show that the assignee had power to bind the assignor by a covenant of warranty, for such an obligation could not be satisfied out of the assets. It is not disputed that the assignee may bind himself personally, but that gives no claim upon the

assets. It will not be contended that the assignee had any authority to bind the beneficiaries under the assignment by a personal covenant.

It follows that, to reach the present case, it must appear that the assignee had authority to create either a legal or equitable lien or charge on the assets. In no way of viewing the proposition, as to the powers of an agent to bind his principal, can such operation be ascribed to it as that claimed in the present case.

An argument has been pressed, based upon the general powers of fiduciary agents. It is contended that the estate is chargeable for the act or contract of the trustee, where it has received benefit through such act or contract. It is claimed that the covenant of warranty enhanced the product of the sale of the land, and thus conferred a benefit on the estate, which is ground in equity for holding the estate liable to answer for the performance of the trustees' contract. It will be found that the rule on this subject, as practically applied by the courts, is restricted within limits that would exclude the respondent's demand. It will be also found that the act or contract of the trustee, in order to bind the estate through the benefit derived, must be within his proper powers, as trustee, and that the benefit must be substantial and actual, and not merely speculative.

In *Magwood v. Patterson*, 1 Hill's Ch. 228, an attempt was unsuccessfully made to charge an estate, in trust for a wife's separate use, with advances made for the domestic use of husband and wife. Chancellor HARPER, whose decree was adopted by the appellate court, says: "The equity on which a creditor comes into this court to render a trust estate liable to the payment of his debt, is this, that he has advanced his money or given credit to effect the objects of the trust, and having accomplished the object of the trust at his own expense, he has a right to be put in the place of the *cestui que trust*, or to be reimbursed out of the trust funds." Again he says: "To expend money for the benefit of the trust estate, would seem to mean either adding value to the estate, or defraying charges to which the trust estate would be liable."

In *Carter v. Eveleigh*, 4 Dess. Eq. 19, the purchase of a gin, for the use of a trust estate, was sanctioned, it being requisite and proper, in order to render the trust estate, consisting of a plantation, productive.

In *Frazer v. McPherson*, 3 Dess. Eq. 393, slaves were purchased

by a trustee, and a mortgage given for the purchase-money. While no question was made in that case as to the propriety of the investment, still the mortgage was held invalid for want of power in the trustee to create a lien or charge on the trust estate. That case went to the length of holding that such lien or charge could not be created, even as to additions to the estate, accruing in the hands of the trustee.

In *Montgomery v. Eveleigh*, 1 McC. Ch. 267, advances made for the maintenance of slaves, part of a trust estate, were held to be chargeable to the estate.

The general rule that persons acting in a fiduciary capacity cannot, by any contract, create a charge upon the trust estate, even in equity, is recognized in *O'Neill v. Abney*, 2 Bail. 317, although exceptions of the class already alluded to are noticed.

We have already seen that, by the terms of the assignment, no power to warrant passed to the assignee, allowing its expressions in the sense demanded by the object of the assignment. Nor can such power be implied from the relative rights and obligations of the several parties affected by the assignment, unless it appears that some duty, incident to the obligation assumed by the assignee in respect to the assigned estate, demands the exercise of such power.

It is not enough that the trustee sees an opportunity of benefiting the trust estate, to warrant an enlargement of his powers, so as to secure such benefit. Such a principle would open to trustees a career of speculation quite inconsistent with the character of trusts. The true rule is that stated by Chancellor HARPER in *Magwood v. Patterson*, which is, in effect, that the act or contract, in order to fall within the proper powers of the trustee, must be in the line of the discharge of his duties under the trust.

In the present case, the benefit claimed to have been realized by the estate is matter of speculative opinion alone. It is not in proof that the land sold for a larger price on account of the covenant of warranty; but we are called on to assume that fact as probable on the ground of argument alone. The respondent's case cannot, therefore, be brought within the principle of *Magwood v. Patterson*; but, independent of this fact, it was no part of the assignee's duty, under the assignment, to warrant the title to the land, and no power is to be implied to do that which he was not called upon by his duty to do.

It only remains to consider the proposition advanced by the

respondent, that a warranty of title is to be implied from the sale and consideration paid. It is well settled in this State that upon a sale of real estate no warranty is to be implied. In the early cases, where relief was granted to defendants sued at law for the purchase-money of land, on the ground of a failure in the quality or quantity of the subject of sale, such relief was, in some instances, said to result from an implied warranty, based upon a full consideration paid, but later cases place the nature of this relief in a true light. In *Evans v. Dendy*, 2 Speers, 9, the purchaser of land at an ordinary's sale, after payment of the purchase-money into the ordinary's hand, and while the sum remained undistributed, sought to recover back the amount paid on the ground that the land had been recovered under title paramount. The court refused to imply a warranty in favor of the purchaser, or to grant him relief. In the opinion of Judge EVANS, the relief which had, since *Grey v. Hankison*, 1 Bay, 278, been frequently allowed to purchasers of land upon the authority of that case, was ascribed to the powers of the courts of law in this State to allow, by way of defense to an action for the purchase-money, the equitable defense of failure of consideration by reason of fraud, misrepresentation or mistake affecting the contract.

The authority of *Evans v. Dendy* was recognized in *Rogers v. Horn*, 6 Rich. 861. It was fully sustained by *Prescott v. Holmes*, 7 Rich. Eq. 9, and in *Com. v. Smith*, 9 Rich. 575, where, though a different doctrine as to implying warranty was applied to sales of personalty, still it was recognized that no such implication arose in the case of sales of realty.

The petitioner has established no right to be paid out of the assets, and the decree of the Circuit Court must be set aside and the petition dismissed.

WRIGHT, J., concurred.

 Massot v. Moses.

MASSOT V. MOSES.

(3 S. C. 163.)

Mine—lease of—conveyance by leases.

A, being seized in fee of a tract of land, in consideration of \$3,000, granted to B "the right and privilege of entering in or upon, by himself or his agents, all or any part" of said tract, "for the purpose of searching for minerals and fossil substances, conducting mining operations to any extent" he "may deem advisable, and for working, removing, selling and appropriating" to, his own use, "for the term of ten years from," etc., "all * * * phosphates that may be found on, by any person or persons, or contained in, any part" of said tract; provided that B "shall not, at any one time during" said term, "engage in working over one-third part" of said tract; such one-third part to be selected by him as often as he may desire. The deed also contained grants to B of the right to cut and remove trees and wood—such trees and wood to remain the property of A—and of a general right of way, with the privilege of constructing railroads and other roads and machinery, to be used in the transportation, manufacture, etc., of said substances, with the right to remove the same at the expiration of the term: *Held*, that this was a demise of the phosphate beds for the term of ten years, with the exclusive right of raising, selling, disposing of, and manufacturing all phosphates found during the term, and that B had the right to divide his interest and convey part of it to others.

The expression "that may be found by any person or persons, or contained in any part" of the land, distinguishes this case from *Lord Mountjoy's, Co.* Litt. 165, and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted.

The principal cases on the subject reviewed, and the principles deducible from them stated.

Unopened veins or beds of minerals contained in and below the surface of the soil may be demised as if they were separate pieces of land.

A grant, for a term of years, of the exclusive right to search for, take, sell and dispose of, to the grantee's use, all phosphates found during the term in a designated tract of land, is a demise of the beds or veins of phosphates contained in the land.

BILL in equity by Horace Massot, plaintiff, against O. A. Moses, W. L. Bradley and C. C. Coe, defendants.

The bill alleged that on the 24th April, 1868, the plaintiff was seized in fee of a plantation in Charleston county containing one

hundred and thirteen acres of land, in, upon, or under which, there were certain veins or beds of phosphate rock of great value; that on the day and year mentioned, the plaintiff entered into an agreement with the defendant Moses, whereby, in consideration of the sum of \$2,000, he granted, sold and conveyed unto the said Moses, "his heirs, executors and assigns, the right and privilege of entering, by himself and his agents, in and upon all or any part of the said tract of land, for the purpose of searching for minerals and fossil substances and conducting mining operations, to any extent the said Moses might deem advisable, and for working, removing, selling, using and appropriating, as the property of the said Moses, for the term of ten years, all organic or unorganic minerals, rocks, fossils, marls or so-called phosphates that might be found on, by any person or persons, or contained in, any part of said plantation," which said privilege was, however, subject to the proviso, "that the said O. A. Moses should not, at any one time, during the aforesaid term of ten years, engage in working over one-third part of the said tract. The third to be so worked to be selected by the said O. A. Moses, and such selection to be made as often as the said O. A. Moses might desire."

That immediately after the execution of the said agreement, the defendant Moses entered upon the said land, and commenced mining for phosphates thereon, and has continued to do so to the present time, and has erected offices, houses and other buildings on said land; that, in November or December, 1869, he, the said Moses, granted to the defendants Bradley and Coe the right to dig and mine, for a long term of years, upon so much of the said plantation as lies to the west of the North Eastern Railroad track, and bound them to pay him one dollar per ton for all phosphates dug by them, and to dig not less than 5,000 tons per annum; that the said Bradley and Coe have entered upon said plantation under their said agreement with Moses, and are prosecuting mining operations thereon, and have dug therefrom large quantities of phosphates, and sold the same; that the said Moses is about to open fresh mines upon that part of the said tract lying to the east of the North Eastern Railroad track, and work the same for his own benefit.

The bill charged that the assignment by Moses to Bradley and Coe was illegal, and a fraud upon the plaintiff, and extinguished all his right and interest in said tract of land, and that the plaintiff was entitled to an account of all the phosphates dug by the

Massot v. Moses.

defendants on said tract, and the profits and produce thereof; and it prayed that an account be taken of all such phosphates, and of the proceeds of the sales thereof, and that the defendants be enjoined from working the mines in said land.

The defendant Moses filed an answer and demurrer, and the defendants Bradley and Coe an answer and plea to the bill.

On July 1st, 1870, an order, by consent, was made, appointing I. W. Hayne, Esq., referee in the cause, and referring it to him to hear and determine all the issues therein; and on the 26th day of the same month and year, he made his report, which was excepted to by both parties.

Dingle, Pressley, Lord and Inglesby, for plaintiff, contended: I. That the deed of 24th April, 1868, granted to Moses the right to dig on the premises described therein for phosphates, but conferred no property or estate in the phosphates themselves until severed from the soil. It was a sale, therefore, of such phosphates only as were raised during the term, and conveyed to Moses an incorporeal and not a corporeal hereditament. *Collier on Mines*, 4 Law Lib., 6th Series, 1, 15, 111; *Bainbridge on Mines*, 156, 710, 733, 300; *Bac. Abr., Leases, K*; *Doe v. Wood*, 2 Barn. & Ald. 731; *Cheatham v. Williamson*, 4 East, 469; *Norway v. Roe*, 19 Ves. 158; *Grubb v. Bayard*, 2 Wall. Jr. 81; *Funk v. Haldeman*, 53 Penn. 229. The deed, therefore, was not a lease but a license.

II. That the license conferred upon Moses was not exclusive of the plaintiff's right to dig for and take phosphates from the premises. *Collier*, 9; *Bainbridge*, 308; *Lord Montjoy's case*; *Johnston Iron Company v. Cambrice Iron Company*, 32 Penn. 241; *Glowinger v. Franklin Coal Company*, 55 id. 1; *Clark v. Way*, 11 Rich. 624; 2 Bl. Com. 20; *Smith on Real Prop.* 4; *Caldwell v. Fulton*, 31 Penn. 475; *Clement v. Youngman*, 40 id. 341, and cases cited on first point.

III. It is contended that the grant to Moses, though a license, was irrevocable and assignable, but we insist that the contract between Moses and Bradley and Coe was not an assignment of an existing interest, but the creation of a new interest—a license from Moses to Bradley and Coe. *Tayl. L. and T.*, §§ 426, 429, 431.

IV. That the incorporeal hereditament granted to Moses, though assignable, was indivisible, and by attempting to sever it Moses has

Massot v. Moses.

destroyed it. See cases cited above, and *Lyman v. Abel*, 16 Johns. 30; *Van Rensselaer v. Radcliffe*, 10 Wend. 639.

Cases were also cited upon the plaintiff's second and third grounds of appeal, which are not given, as those grounds were not considered by the court.

Buist, for defendant Moses. The deed of 24th April, 1868, is substantially a lease for ten years of the minerals in the land. It is a grant of a corporeal right, and cannot be properly construed to be the grant of a mere license or incorporeal hereditament. *Crabbe's Dig., Real Property*, § 1,281; *Jackson v. Harson*, 7 Cow. 326; *Jackson v. Kesewank*, 10 Johns. 336; *Shep. Touchstone*, 86; 3 Bac. Abr. 363; *Moore v. Fletcher*, 16 Me. 63; *Crosby v. Bradley*, 20 id. 61; *Bac. Abr., Leases, K*; 2 Washb. on Real Prop. 345; 1 id. 12, 270; *Stewart v. Garnett*, 3 Sim. 398; *Legard v. Hodges*, 3 Bro. Ch. 441; *Co. Litt.* 46; *Parker v. Plummer*, Cro. Eliz. 190; *Queen v. Winter*, 2 Salk. 588; *Paramour v. Yardley*, Flow. 539; *Throgmorton v. Tracy*, id. 145; *Col. on Mines*, 5; *Stoughton v. Leigh*, 1 Taunt. 403; *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Yale on Cal. Min. Claims and Wat. Rights*, 215; *Cary v. Daniels*, 5 Metc. 236; *Seaman v. Vaudrey*, 16 Ves. 389; 1 W. Bl. 482; *Muskett v. Hill*, 5 Bing. N. C. 694; *New Jersey Zinc Co. v. New Jersey Frank. Co.*, 13 N. J. Eq. 322; *United States v. Gratiot*, 14 Pet. 526. He also cited the Pennsylvania cases, cited on the other side at great length.

Moses had the right to divide his interest and assign part of it to others. 2 Story's Eq., §§ 1039, 1040; 12 Petersd., tit. Leases; 2 Story Eq., §§ 1050, 1051.

He also cited *Ricketts v. Bennett*, 50 Eng. C. L. 695; *Dickenson v. Valpy*, 10 Barn. & Cress. 41; *Hautayne v. Bourne*, 7 M. & W. 595.

Memminger and *Corbin*, for defendants.

WILLARD, J. In the decision below, and in the argument at the bar, an important feature of this case has not received the attention due to the importance of its bearing. The line of argument pursued assumes that the question, whether the defendant ~~loses~~ acquired under the grant of Massot an exclusive right, as against the grantor, to the minerals contained within the premises described, for the period of ten years, is to be decided by first deter-

Massot v. Moses.

mining whether the thing granted was in its nature corporeal or incorporeal. It is contended that the grant created, at most, either a mere license, or an incorporeal hereditament, and authorities are cited to show that in such cases the grant does not include the right of the grantor to exercise, concurrently, a similar right to that conferred by his grant or license. The objection to this line of argument is, that it lays too great stress on the technical import of the words of conveyance, and gives too little attention to the actual intent of the parties, as evinced by the entire instrument. The true inquiry is, what, from the construction of the whole instrument, was the nature of the right, power or property intended by the parties to be vested in the grantee? Having ascertained, from this source, the nature of the thing granted, it will not be difficult to ascertain whether it is corporeal or incorporeal, nor to find the technical terms appropriate to describe such interest.

The instrument in question is, in form, a deed, signed, sealed and witnessed as such. Massot, in consideration of \$2,000, grants, sells and conveys to Moses, his heirs, executors, administrators and assigns, "the right and privilege of entering in and upon, by himself or his agents, all or any part of the land hereinafter described, for the purpose of searching for mineral and fossil substances, conducting mining operations to any extent the said party of the second part may deem advisable, and for working, removing, selling, and, as the property of the party of the second part, to use and appropriate, for the term of ten years from the date of these presents, all organic or inorganic minerals, rocks, fossils, marl, or so-called phosphates, that may be found on, by any person or persons, or contained in, any part of all that plantation or tract of land," etc. Moses is further to have the right to cut and remove trees, wood and timber when he shall deem it advisable and advantageous; such trees, wood and timber to remain the property of Massot, who is to have the disposal and profit thereof.

The deed contains the following proviso: "*Provided, further,* that the party of the second part (Moses) shall not, at any one time during the aforesaid term of ten years, engage in working over one-third part of the said tract, the third to be worked to be selected by the party of the second part, and said selection to be made as often as the party of the second part may desire." The deed further conveys, for the like period, a general right of way, with the privilege of constructing railroads and other roads, and machinery, to be

used in the extraction, preparation, manufacture and transportation of the organic and inorganic substances in question, with the right to remove the same at the expiration of the term aforesaid.

What distinguishes this grant from that in *Lord Mountjoy's* case, Co. Litt. 165, and in all the other cases relied on as decisive against the exclusive nature of the grant, is contained in the expression "that may be found on, by any person or persons, or contained in any part," etc. The term "any person" must be regarded as including the grantor, so that if the grantor, in an attempt to exercise the same right as that conferred, should find any such substances upon the premises described, such act of finding would complete the title of the grantee or his assigns to the substances so found under the express terms of the grant. It might, perhaps, be said that this applies only to substances "found on," but not those "contained in" the premises. The construction cannot prevail, for it would contravene the general intent of the instrument. It is clear that, as to some part of the minerals, the right of the grantor is excluded, and to that extent something more than a right in the nature of common is conveyed.

How far, then, does this exclusion extend? It is evident that the parties did not intend to make a distinction, as to the character of the grantee's title, between the minerals lying on the surface of the ground and those contained within it. Such a distinction would be inconvenient and senseless. If, then, it was intended that the grantee should have the same right in respect to the one class as to the other, the particular expression under consideration must be regarded as characterizing the grantee's right, as to the whole, as exclusive of the grantor and all other persons.

This view is aided by the fact that the consideration of the deed was an entire sum of money demandable absolutely under the deed, and which may be assumed to include a valuation, fixed by the parties, on all minerals that the grantee was authorized to remove from the premises, and might, by possibility, remove therefrom during the term of ten years, and by the further fact that the deed, by its terms, professed to sell and convey the material itself, as well as the right to search for and take it.

It is not necessary to rest this case upon the whole ground taken in *Caldwell v. Fulton*, 31 Penn. 475. In that case the grant was held to exclude the grantor on the ground that the consideration, being an entire sum, paid for the right conferred, evidenced an

Massot v. Moses.

intent to sell the whole mineral content as such. Independent of the character of the consideration, the language of the grant, in *Caldwell v. Fulton*, was substantially the same as that in *Lord Mountjoy's* case. The opinion in *Caldwell v. Fulton* does not seek to unsettle the authority of *Lord Mountjoy's* case, but finds grounds of distinguishing the cases, in the fact that different inferences are to be drawn, as to the intended exclusiveness of the grant, from the respective considerations in the two grants.

In the case before this court, the construction of the grant does not depend wholly on the character of the consideration, as we have already seen. It is, however, a circumstance in the case, and, therefore, it is in place to inquire, whether the fact that the consideration is an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted, tends to show an intent to convey an exclusive interest.

Apart from the limitation of ten years, if the subject-matter of the grant had been personal property, instead of land, it would have passed an exclusive right of property to the grantee.

A bill of sale, for a valuable consideration paid, of all the goods of a certain kind in a certain warehouse, or all the quarried stone or mined ores in a certain field, would show an intent to transfer a perfect title. Should the vendor, at the same time, confer a license upon the purchaser to enter upon his premises, and to search for, and remove the property, its effect would be to enlarge still further the right of the purchaser.

Although the subject-matter of the contract be land, still, if capable of severance, so as to become personal property, the parties are not precluded, by any rule of law, from treating it, in its unsevered condition, as personalty, and transferring title accordingly. *Clark v. Way*, 11 Rich. 624.

These propositions are not disputed by *Lord Mountjoy's* case, nor by any of the English or American cases following its authority; but, on the other hand, are supported by many cases of undoubted authority.

To all such contracts and grants, whether relating to realty or personalty, the test that has been applied is, the intent of the parties. The difference between the two cases is this: that certain words sufficient to manifest such intent, in the case of personalty, are not deemed sufficient for that purpose in the case of realty.

The proper conclusion from these cases would seem to be, that

grants of a right to enter the lands of the grantor and sever therefrom and appropriate its products or mineral contents, are subject to a presumption not applicable to the case of a sale of personalty, that the grantor did not intend to exclude his own proprietary right to a concurrent enjoyment with the licensee of the power granted. If this view is correct, any words evidencing an intent on the part of the grantor to part with his proprietary rights over the subject-matter to which the grant relates, would rebut such presumption. What force, then, should be given to words tending to evidence an intent on the part of the grantor to exclude himself from the enjoyment concurrently with the grantee of the right conferred? So far as the existence of such a presumption bears on the question, the obvious answer is, that the same force should be given to the expressions employed that would be given had the subject-matter been other than realty. The presumption, indeed, demands some positive evidence of an exclusive intent, but does not influence the force of the evidence of such intent.

If the foregoing propositions flow from the principles of law, and are compatible with the adjudicated cases, then we have a clear rule to govern us in seeking the construction of the grant in question.

We have only to ask what the parties had in contemplation as the right intended to be created, giving to the terms, or expressions employed by them in a technical sense, that technical force and effect conferred upon them by the adjudicated cases entitled to have weight as authority. We have now to look into the current of decisions to verify the grounds of our conclusions; but that we may the better understand their bearing and force, it is proper to observe some of the features in the various instruments which have received judicial construction as bearing on the question of intent.

In all the grants of mining rights, from the earliest reported cases down to the present time, there is a striking similarity in the terms used to describe the character of the rights intended to be conferred. It is described, substantially, as a right to enter certain designated premises, and to search for minerals, to mine or work them, appropriate and sell them. In some cases the premises may be used for manufacture only to the extent of preparing the raw material for use or sale; in other cases, like the case in hand, the right to use the premises for the purpose of manufacture is unlimited, as to the nature and extent of the manufacturing

powers. The right uniformly embraces authority to go upon the land of another, and perform there certain acts which could only be justified under authority, derived from the owner, of severing from the land certain portions of the body of the land, so as to become personal property, and appropriating the same as against the right of the owner and all other persons.

Such a right may exist perfect in the hands of a grantee, and yet not exclude the right of the grantor or owner to take from the land like substances, for his own use, so that he does not obstruct or impede such operations as the grantee may have set on foot in virtue of his grant.

Although the right to mine in the lands of the grantor may extend to all minerals, or to all of a given class, yet that does not exclude the grantor from appropriating minerals of that description, provided he does not obstruct the operations of the grantee. In a word, the possession of a right to go upon the lands of another to search for, sever, remove and appropriate any or all minerals, or any or all of a given class, does not exclude the owner of the land from taking to his own use, minerals of the same character and class from the premises embraced in the grant. Nor does the fact that such right is, by the terms of the grant, an assignable interest in the hands of such grantee, operate to the exclusion of the grantor.

When, however, the grant evidences an intent to exclude the grantor, such intent provides whether the grant extends to all mineral substances, or to all of one or more classes.

There are three modes in which the intent to exclude the grantor has been expressed: first, by terms importing a sale and conveyance of minerals, as such, in which case the grantor's right is excluded, by a necessary implication, from the possession of full proprietary right on the part of the grantee; second, by words of conveyance, conferring on the grantee exclusive power over the subject-matter of the grant; and, third, by provisions excluding the grantor from the performance of acts appropriate to him as owner of the land, where the effect of such exclusion is to leave unlimited control in the grantee of all materials to which the mining right relates.

An intent to exclude the grantor, though not expressed in the body of the deed, may be implied from the nature of the consideration. The fact that the grantee is bound to pay for the sub-

stances appropriated by him according to the quantity realized, at an agreed rate, whether in kind or in money, does not, of itself, disclose an intent to exclude the grantor. But if the consideration appears to include a value fixed by the parties on the whole mineral deposit, and is demandable absolutely under the contract, without depending on the value of the actual result from the mining operations of the grantee, the grant is regarded as a sale of the mineral, and, as to it, the grantor is excluded.

We will now look into the cases, in order to verify the deductions from them already stated.

Lord Mountjoy's case, Co. Litt. 165, determines that a reservation of the right to take minerals and turf, although existing as an assignable and heritable interest, does not necessarily exclude the owner of the land. In that case, there were no words expressive of an intent to exclude the owner of the land, independent of the nature of the thing reserved. It is true, the reservation must be regarded as made upon consideration, but the consideration, whatever it may have been, was not in a form enabling the court to conclude that, in fixing that consideration, the parties had acted upon a real or assumed valuation of all the materials subject to appropriation under the terms of the reservation.

The authority of this case has been recognized in this State, in *Clark v. Way*, 11 Rich. 624; in Pennsylvania, in *Caldwell v. Fulton*, 31 Penn. 624, and *Funk v. Haldeman*, 53 id. 229.

Welson v. McKreth, 3 Burr. 1824, holds that one may have, as against the owner of the land, an exclusive right to take the turf. It is worthy of notice that, from all that appears in that case, the right of the plaintiff may have been limited to so much as he should require for a particular use. The question of exclusiveness was not treated in that case as at all dependent on the question, whether, in its nature, the right conferred was corporeal or incorporeal, but wholly on the terms of the grant or prescription under which it was claimed.

Chitham v. Williamson, 4 East, 469, followed *Lord Mountjoy's* case. Lord ELLENBOROUGH says, in that case, "no case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him." This is far from saying, that such an exclusive right cannot be created by the use of suitable language in the

Massot v. Moses.

grant. It is only authority for saying, that exclusion will not be implied from the naked fact of a grant of that nature.

Doe v. Wood, 2 Barn. & Ald. 724, contained nothing to take it out of *Lord Mountjoy's* case.

The question was, whether the grant operated as a demise or a license merely. The discussion of the question by ABBOTT, C. J., shows, that the question of exclusiveness, as settled by the language and intent of the grant, was regarded as laying at the foundation of the question, whether the instrument could take effect as a demise. It was not in terms a demise, and could only be made to operate as such, when the right intended to be conferred was of such a nature as to be the proper subject of a demise. The consideration of that grant tended rather to strengthen than rebut the presumption, that the grantor did not intend to divest himself of the entire property of the minerals, for, instead of its being an entire sum, including the value of all materials subject to appropriation under it, it was a reservation of a share of the minerals, as such. The idea of a grant, operating as a sale or demise of the minerals themselves, is distinctly recognized, and the case before the court distinguished from one resting on a grant of that nature.

It is fairly inferable from the case, that, had the grant conferred an exclusive right of mining for a term of years, it would have been regarded a demise, although the subject-matter was not an opened mine, but merely minerals contained in the land. This proposition is as distinctly recognized as it could well be, without being directly ruled by the decision.

Muskett v. Hill, 2 Bing. N. C. 654, while adhering to *Doe v. Wood*, goes a step further, holding, under a grant closely resembling that in *Doe v. Wood*, that a license of that character could operate as a grant in respect of minerals taken under its authority, and therefore constituted an assignable interest in the hands of the licensee. *Clark v. Way*, 11 Rich. 624, applied the principles of *Lord Mountjoy's* case to the case of a right to take timber in the land of another. The applicability is put distinctly on the ground that the grant contained no words of exclusion. *Caldwell v. Fulton*, 31 Penn. 475, is a leading Pennsylvania case, bearing on this question. The adjudications of the courts of that State, in this branch of the law, are entitled to great consideration, both for the extent and value of the mining operations that have been affected by such adjudications, and for the great learning and experience of the

judges from which they have emanated. Apart from the nature of the consideration of the grant in *Caldwell v. Fulton*, it was distinctly ruled by *Lord Mountjoy's* case. Judge WOODWARD, who delivered the opinion of the court in a previous case between the same parties, both in that case, and in *Funk v. Haldeman*, 53 Penn. 339. recognized the authority of *Lord Mountjoy's* case, as reported by Lord COKE, under the weight of authority that had, both in the English and American courts, sanctioned its rulings, but held that the grant then under consideration was to be regarded as a sale, for a valuable consideration, of the absolute and exclusive right to all the coal under the grantor's land. The opinion in the recent case reported in 31 Penn. 475, was delivered by Judge STRONG. This opinion does not so distinctly appear to place the decision on the ground of the nature of the consideration paid, but that such was the turning point of the case distinctly appears in *Clement v. Youngman*, where the same judge states the point decided in *Caldwell v. Fulton*. *Clement v. Youngman*, 40 Penn. 341, contains this important expression: "In *Caldwell v. Fulton*, we held that a grant of an unlimited right, title and privilege to dig and take away the coal, in a designated tract of land, to any extent the grantee might think proper, and for a consideration, presently paid, was a grant of the coal itself, and not merely a license or incorporeal right." To this view of *Caldwell v. Fulton*, the court declares itself as adhering. The grant in that case related to two distinct kinds of material to be found on the premises, namely, iron and limestone. The court held that the agreement was not intended by the parties to confer an absolute right to either the ore or the limestone, on the ground that, as it regards the ore, the only consideration stated was an agreement to pay for the amount of ore actually taken, and as to the limestone, no consideration of any kind was stipulated for, besides the limestone was only to be taken to be used in the manufacture of iron from the ore. This case is in entire harmony with *Lord Mountjoy's* case, and is distinguishable from *Caldwell v. Fulton* by the fact that there was no consideration stipulated for, that implied a sale of all the minerals of the designated kinds on the premises. It holds that an agreement to pay a stipulated price for the minerals actually taken, estimated upon the quantity taken, is not such a consideration as implies a sale of the whole mineral content. In this last respect the case resembles *Doe v. Wood*, with the exception that the consideration stipulated for, in that case, was a

Massot v. Moses.

share of the minerals, instead of a fixed equivalent in money. This case treats the question as to whether the right granted is corporeal as depending upon the intention of the parties as to its exclusiveness, as derived from all parts of the instrument construed together.

Glonninger v. Franklin Coal Co., 55 Penn. 7. The grant in this case was held not to be exclusive on two grounds: first, the consideration was a merely nominal sum, \$6.50; and, second, the right to take coal was limited to the amount required by the grantee for his use as a blacksmith. In construing that part of the grant that operated to limit the amount to be taken, the court took into account the state of knowledge, as to the value of coal, and its uses at the time of making the contract.

Graves v. Hodges, 55 Penn. 564, holds that an agreement to pay a stipulated price per ton for ore taken does not import an exclusive privilege. *Grubb v. Bayard*, 2 Wall. Jr. 81, where the consideration was also an amount stipulated to be paid per ton for the mineral taken, holds that the grant was not exclusive. Thus we find, in cases entitled to weight as authority, the proposition that when the grantee has unlimited authority over the subject-matter of the grant, a consideration consisting of an entire sum, including the valuation fixed by the parties upon the whole mineral content of the land, or of the class of minerals to which the mining right relates, demandable absolutely under the contract, furnishes evidence of an intent to confer an exclusive right on the grantee. On the other hand, the proposition is not disputed by any of the cases regarded as of leading authority on this subject.

This conclusion appears entirely reasonable. No presumption of an intent to reserve any part of the thing granted ought to prevail against ground of reasonable inference, that the price received by the grantor is an equivalent for the whole thing granted. Certainly in equity such a presumption could not be allowed to prevail over the manifest equity disclosed by the nature of the consideration.

We are not called upon in this case to decide that the fact of such a consideration, standing by itself, is sufficient to characterize the contract as intending an exclusive right; but as in the present case there are other evidences of such intent, we are only required to hold that the existence of such a consideration tends to establish an exclusive intent. We hold, therefore, that the grant to the defendant Moses was intended to, and did in fact, exclude the grantor, Massot, from all right to appropriate to himself any of th.

mineral substance to which the grant relates during the term of the contract, and from conferring such right upon any other person, as against the grantee or those of right claiming under the grant.

Had Moses' right been unlimited as to time, the grant would have operated as an absolute sale and conveyance of the mineral itself, as in the case of *Caldwell v. Fulton*. The limitation of the right to ten years prevents it from having this effect, but does not change the character of the grantee's authority during that period, such authority being that due to a full proprietorship of the minerals during the term. The words "sell and convey" cannot have their full effect, in consequence of the limitation in point of time, but in conjunction with other expressions of the grant, they serve to fix the character of the grantee's power and right, as a full proprietorship, during such term. This conclusion is not affected by the limitation imposed, as to the extent of the surface to be worked at any given time, as that limitation does not impair the right to work the whole, but limits the use of the surface of the ground as an incident to the operation of searching for and removing the minerals.

It is clear that the grant operated as a demise of the minerals for the term of ten years, and, therefore, the interest of the grantee was divisible.

Three things are necessary to a demise; first, a proper subject-matter; second, possession for a term of years; and, third, a right to the profits during such term. The argument in behalf of the plaintiff is, that the powers conferred by the grant does not relate to any thing corporeal, of which possession may be had. If this conclusion be established, it would result, as contended for by the plaintiff, that the power being incorporeal, it was indivisible, and the defendant, having attempted to divide it, had destroyed it.

The answer to this argument is supplied by the authorities, as well as by the reason of the case. The law of England, on this subject, is stated by Mr. Bainbridge, in his work on the Law of Mines and Minerals, 163. He states that minerals contained in the land, although unopened, as well as opened mines, are capable of forming "a distinct possession or inheritance," and that if it was requisite that livery of seizin should be made of them, still they are susceptible of such livery. That author does not cite the authority of adjudicated cases to these propositions as fully as might be expected.

It is, however, not unlikely that this view of the law, so distinctly shadowed forth in *Doe v. Wood*, 2 Barn. & Ald. 924, should have been practically acted upon without further controversy.

In *Doe v. Wood* the question was, whether ejectment would lie in the case of unopened mines, by one having the right to mine, though not entitled as owner or lessee of the land. If property of that kind had been incapable of sustaining a possessory title, the answer to the action would have been complete without any further inquiry, in order to ascertain the intention of the parties to the grant. The fact that the court regarded it as important to ascertain whether the parties intended it as a demise shows, conclusively, that it was capable of acting as a demise, if the parties so intended. This case leaves no doubt as to how the law of England stood, and if no other authority for so doing existed, Mr. Bainbridge would have been justified in stating, in the manner in which he has stated it, the law of that country.

Caldwell v. Fulton, 31 Penn. 475, holds that, by the law of Pennsylvania, minerals unsevered are land, capable of being held and transferred, apart from the ownership of the land.

This determination necessarily involved the idea that a possessory title could be had "in minerals in place," and, therefore, we should infer that a grant or conveyance, intended by the parties to operate as a transfer of property of that character, for a term of years, accompanied by an exclusive enjoyment of the profits thereof, would create a demise. There are, however, expressions in *Caldwell v. Fulton*, and *Clement v. Youngman*, that involve this deduction in some perplexity, as it regards the effect of the Pennsylvania cases. In these cases stress was laid on the fact that the right of the grantee was wholly unlimited in respect of time, quantity and use. It is not difficult to see the bearing of that fact in *Caldwell v. Fulton*, for there the conclusion that the grant operated to exclude the grantor rested on the fact that the parties intended a sale and conveyance. It was important to show that the entire interest in the coal was transferred. But it would not seem to follow that there was no other mode by which the grantor could have conferred an exclusive right on the grantee, than by making an instrument that was capable of operating as a sale and conveyance absolute of the whole content of coal.

The difficulty as to the construction intended by the Pennsylvania cases arises from expressions employed in the opinions. The opin-

ion of Judge WOODWARD, reported in 81 Penn. 475, is clear upon this point. He sought to rest the case upon the inferences arising out of the consideration. From the consideration he inferred a contract of sale of the whole content of coal. His language is, "he sold for a valuable consideration all he had in sixteen acres, and all the coal in his other land. I say all, because the grant is limited to no time or quantity or purpose or person." The absence of a limitation as to time is here referred to as defining *how much* was sold, and not for the reason that such a limitation would be necessarily decisive against the grant operating as exclusive against the grantor.

Judge STRONG, in the opinion in the second case that arose between the parties to *Caldwell v. Fulton*, sought to place the right of the grantee on quite different ground from that previously taken by Judge WOODWARD. His theory of the case started with the proposition that "minerals in place" were land, and might be transferred as such. He then lays down the principle that a conveyance of the whole profit of land is a conveyance of the land itself. In order to apply these principles to the case in hand, it was requisite to show two things: first, that coal was a profit of land; and, second, that the grantee acquired a right to the whole profit of coal. In answering the objection that coal being but part of the profit of the land, the principle could not be applied, he holds that the subject of the grant being coal, the whole usufruct and dominion were granted. In other words, coal in place was, in itself, land, and might be conveyed as such. It is difficult to understand why, if coal is land, it should be necessary to treat it as merely a profit of land. According to this view a sale of coal was a sale of land *eo nomine*. Why, then, resort to a principle which is only important when the land, as such, is not conveyed? To the operation of this principle he ascribes the conclusion in *Lord Mountjoy's case*, *Cheatnam v. Williamson*, *Doe v. Wood* and *Grubb v. Bayard*.

An examination of the cases last mentioned will show that the idea that a conveyance of the profit of land is a conveyance of the land did not enter into the grounds of decision in those cases. Of *Lord Mountjoy's case*, Judge STRONG says that the grant was "only sufficient for a single specified purpose, viz.: the manufacture of alum and copperas." And thus it was not in conflict. In other words, if the right in that case had not been subject to that particular limitation, it would have been held to exclude the grantor.

Massot v. Moses.

It is far from clear that the grant in *Lord Mountjoy's* case, so far as it related to ores, was subject to the limitation that clearly applied to the turf; at all events, that solution was not indicated in the case as reported.

It is very clear that Lord ELLENBOROUGH did not so understand *Lord Mountjoy's* case, when, in *Cheatham v. Williamson*, he deduced from that case the proposition, that one having a liberty of digging for coals in another's land has not an exclusive right to the coals, as against the owner of the soil. Had the grant in *Lord Mountjoy's* case been unlimited, as to the purpose for which the grantee should take the turf or minerals, it still would have been only "a liberty of digging" in another's soil, and the remark of Lord ELLENBOROUGH would be equally applicable to the case.

The comment made by STRONG, J., on *Cheatham v. Williamson*, that that case was decided upon the idea that livery of seisin was indispensable, does not appear to be sustained by the report of that case in 4 East. LAWRENCE, J., says, "the covenant, therefore, can only operate as a grant, but will not pass the land itself without livery."

The allusion to the want of livery arose from the fact that E. Hyde was only the owner of the equity of redemption, and had not the legal estate in him, and as the right to mine was reserved in his deed, it was necessarily unaccompanied by livery, for E. Hyde, not having the legal estate, could not make livery. The remark of LAWRENCE, J., if entitled to be regarded as disclosing the point of the case, falls far short of making the assertion that such an interest as an exclusive grant would have created was incapable of being attended by livery.

Judge STRONG's comment on *Doe v. Wood*, 2 Barn. & Ald. 719, fails to elicit the full import of that case. It was not the fact that the grant was limited to a term of 21 years, that was the ground of holding it a license. The question was, whether it was a demise or license. If a demise, it would be the limitation of a term of years that would make it such. That, of course, then, was not the turning point as between a demise and a license. ABBOTT, C. J., states the question as follows: "One of the questions was whether this indenture operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the condition mentioned, or only a license to work and get the metals and minerals that might be found within the

limits described." Here is a clear conclusion that a legal estate in the mines and minerals might be created for a term of years, and so far as to operate as a demise. The question was, then, had the parties done so? The conclusion of the court was, that by the terms of the grant the grantee did not take a present interest in the minerals as proprietor, but that his proprietary right arose only when the minerals were severed from the land. It will be borne in mind, that in that case the grantor retained an interest in the minerals themselves in the form of a share of all minerals raised. That decision clearly rests on the idea that the grant was not exclusive, because it was nothing more than a liberty to dig for minerals in the land of another. Had there been anything in the granting part of the deed, or in the consideration, showing that the parties intended it to be exclusive, it is clear that it would have been upheld as a demise. This shows clearly that the limitation, as to time, was not the turning point in the case. That case professed to follow *Lord Mountjoy's* case, and we are at liberty to conclude that the construction put upon the grant was the result of the principle settled in that case. This view seems to strengthen the idea that has already been advanced in regard to *Lord Mountjoy's* case, that the court allowed a presumption, in the absence of words of exclusion, that the grantor did not intend to divest himself of his proprietary right as owner of the land, but to admit the grantee to a participation in certain of those rights. The conclusion of STRONG, J., is summed up in these words: "When the intent is to give the entire usufruct, and power of disposal, the legal title must be held to pass." Standing by itself, this proposition is not controverted, nor was it necessary to go beyond the mere affirmation of that proposition in *Caldwell v. Fulton*. But it does not follow that because the entire usufruct and power are limited to a term of years, that a legal estate by way of demise will not pass. It will be observed that STRONG, J., speaks of "the entire usufruct and power of disposal." There is a well defined distinction between a deed of the usufruct and the power of disposal as it regards its competency as an actual conveyance of the land to which it relates. A deed of the usufruct of land can only convey the land itself under the operation of a rule of construction enlarging the terms of the deed beyond their direct import, on the principle of implication. Not so in the case of a deed con-

Massot v. Moses.

veying the "power of disposal," when such a conveyance is made for the use and enjoyment of the grantee.

In the latter case, the subject of the grant is dominion over the land. All that a deed purporting to convey the land, specifically, can pass, is the dominion over the land.

The deed does not affect the physical attributes of the land, or confer on it any quality fitting it to become subject to the dominion of the new owner. It simply transfers to the grantee what the grantor previously possessed. "Power of disposal is dominion over the land."

When, therefore, the deed conveys both the usufruct and power of disposal, it is unnecessary to resort to the rule, that conveyance of the whole usufruct is the conveyance of the land itself, for the deed acts at once, by a principle of interpretation within itself, as a conveyance of the land.

Regarding coal as land, the deed in *Caldwell v. Fulton* did not merely convey the usufruct of land, but conveyed complete and absolute power of control over land, for the use and enjoyment of the grantee.

For the same reason, had that deed conveyed the same power of control and disposal for a term of years, it would have created a demise. It is quite evident, from the summary already quoted, as made in *Clement v. Youngman* as to the point ruled in *Caldwell v. Fulton*, that the court, on mature consideration, was disposed to adhere to the conclusion that the true point of distinction between that case and *Lord Mountjoy's* case, was the difference in the inferences to be drawn from the considerations of the respective grants.

No one disputes the validity of a lease of opened mines, nor that such a lease covers the stratum or vein of minerals, so far as embraced within the lands described, and is not limited to the openings, which are merely conveniences for getting access to the mineral, nor to the superficial occupation of the ground.

Extensive workings may serve to develop the value of a stratum or vein of mineral, but are not essential to complete the legal idea of property in such substances.

The legal conception of land is that of a right, within the limits of law, to control some part of the earth embracing its surface and content.

In general, conveyancing deeds only with the surface of the ground, and, accordingly, we have come to consider surveyors' lines

Thomas v. Kelly.

as the true boundaries of property. If we find difficulty in conceiving of the ownership of a vein of mineral as land, it probably arises from the fact that we cannot conceive of the outlines of such property being traced by surveyors' lines. But this is a mere superficial idea of land. A man's possessions, as the owner of land, is a solid body of rock, soil and water, bounded by planes instead of lines. There is no good reason why he should not, if he chooses, divide his possessions with those who can make a more advantageous use of it than he can make, by horizontal planes, or oblique planes, so long as the law can comprehend and effectuate his purpose.

Such is the practice of mankind, and it is due to the practice of the law that its ideas should keep pace with the habits and usages of practical life.

The notion of accessibility forms no part of the idea of land, yet the difficulty that arises in attempting to form a legal conception of a vein of mineral as land, springs from the idea of its inaccessibility. As it regards livery of seizin, it is not, now-a-days, a question whether the owner of the soil can reach it, in order to perfect a symbolical delivery, but whether the statute of uses can reach it so as to give effect to a deed of bargain and sale.

The interest of Moses being a demise, it was competent for him to divide it, and, therefore, the ground of the bill fails, and it must be dismissed with cost.

MOSES, C. J., and WRIGHT, J., concurred.

THOMAS V. KELLY.

(38. C. 214.)

Will — conditional devise — failure to perform condition.

Devise of a plantation to testator's wife for life, "and at her death to be appraised by three disinterested freeholders; and that my son W. have the right to said plantation at the appraised value, if he choose to do so, at a credit of one, two and three years, in equal annual payments, without interest; but if he should decline to take said plantation, then my executors are * * * to sell * * * the same, and the money arising from the sale * * * to be divided amongst my children." At

Thomas v. Kelly.

the death of testator's widow, the plantation was appraised, and W. having elected to take it, gave to the executors his three sealed notes, payable in one, two and three years, each for one-third of the appraised value, but failed to pay the notes at maturity. *Held*, that payment of the appraised value was a condition annexed to the devise, and that W. having failed to perform the condition, his estate ceased.

BILL by executors to settle an estate. The opinion states the case.

MOSES, C. J. William Kelly, on January 8, 1858, executed his last will and testament, and departed this life on the ——— day of ———, 1860.

The plaintiffs are his surviving executors, John W. Kelly, a son of the testator, having died after qualifying. Elizabeth Kelly, his widow, died in March, 1861. The testator left children and grandchildren. The questions before the court arise under the second and fifth clauses of the will, of which a copy is to be found in the brief. In January, 1862 (as is stated in the bill and admitted in the answer), W. H. Kelly was elected to take the land devised by the said second clause at \$12,210, the value at which it was appraised, and on the 21st of March of the same year, executed to his co-executors (the plaintiffs) three sealed notes, each for \$4,070, payable in one, two and three years. He entered and held possession as of his own property until his death in 1864; his widow and children occupied it until 1866, when McJunkin, one of the plaintiffs, who also administered on the estate of the said John W. Kelly, rented out the premises with the consent of the widow. The notes are still unpaid.

Harriet S. Hodges has been in possession of the Newberry tract (devised by the fifth clause of the will) since the death of the testator, but has paid no part of the money for which she was to account.

No further statement of the matters set forth in the bill is necessary, because the motion only brings to the review of this court the judgment of the chancellor on the points made under the clauses referred to.

The doctrine that a vendor of land has an equitable lien for the payment of the consideration money has never prevailed in this State. *McCorkle v. Montgomery*, 11 Rich. Eq. 132; *Walker v. Covar*, 2 S. C. 16. Even if the principle contended for had been adopted by our courts, it could not be extended to a party who did not

stand in the relation of a vendor having parted with his title for a consideration promised and still unpaid. It would be a contradiction in terms to apply it to any change of real estate, proceeding from gift and not from contract, for its very purpose is to secure the payment of the purchase-money where such property has been sold without a mortgage or other security.

A will is arbitrary — the testator declares his own mind and purpose. A contract, on the contrary, is the result of an agreement with some other mind, and the intent and purpose of both the parties is to be ascertained.

When, however, a testator affixes as a condition of the devise, the payment of a sum of money, or the performance of any other act, without a compliance with which the benefit is not to be enjoyed, or when he subjects the devise to some stipulation, showing a clear intent that it is not to vest absolutely, unless the prescribed requisition is fulfilled, the condition or stipulation so attaches to the devise, as not only to become part of it, but to operate as the controlling terms upon which its enjoyment is to take effect, or be retained.

All who claim under a will must be governed by it as a whole. If it confers a benefit which is subjected, either by express language or necessary implication, to diminution or abatement, it cannot be freed from the burden by which it is fettered.

In *Glenn v. Fisher*, 5 Johns. Ch. 35, Chancellor KENT says: "He who accepts a benefit under a will must conform to all its provisions, and renounce any right inconsistent with them. This is an obvious and settled principle in equity. He accepts of the devise under the condition of conforming to the will, and a court of equity will compel him to perform the condition; for no man, says Chief Baron EYRE (*Blake v. Bunberry*, 1 Ves. Jr. 523), shall be allowed to disappoint a will under which he takes a benefit."

Mr. Jarman, in his work on Wills, vol. 1, p. 797, says: "No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. Thus, 'a devise to A, he paying,' or he to pay '\$500 within one month after my decease,' would be a condition for breach of which the heir might enter; unless the property were given over in default by way of executory devise." Conditions are either precedent or subsequent, in other words, either the performance of them is made to *precede* the vesting of the estate, or the non-performance to *determine* an

Thomas v. Kelly.

estate antecedently vested. So far as the interest of W. H. Kelly is concerned, it would now make no difference whether the condition is to be regarded as precedent or subsequent.

If the latter, a title to the land vested at the death of the widow of the testator. But the event on which it must continue is the payment of the assessed value at the expiration of the credit. On failure to perform the condition, he loses the right to retain.

In *Finley v. Hunter*, 2 Strobb. Eq. 212, JOHNSTON, Ch., says : "Conditions precedent are such as are, from the nature of the case, or by express requirement, to be performed before the right to which they are annexed can attach or vest. Until they are performed, the right does not vest. Conditions subsequent are such as are to be performed after the right vests or attaches in law, and the general rule is, that the right which has already vested is terminated or divested by a failure to perform them."

The indefeasible right of Wm. H. Kelly did not depend on his mere entry on the land, or his execution of the notes, but did depend on the payment as the annual credits expired. In fact, the executors would have fully complied with their duty by allowing him to enter and hold after the appraisement of the value had been made and agreed to by him, even without requiring any evidence of his indebtedness. No sale of the plantation was to be made to him by the executors. He took, if he accepted of the conditions, directly under the will, and the payment of the money was one of them. To hold that he was to keep the land if he failed to pay the estimated value according to the directions of the will, would be in direct conflict with the intention of the testator, that he was "to have the right to it at the appraised value, if he choose to do so, at a credit of one, two and three years, in equal annual payments, without interest."

He cannot claim a benefit under the will without giving full effect to it, as far as he can. If the devise is affected with conditions, he must take it as it stands, or reject it.

Is there any thing in the will which even intimates an intention on the part of the testator that if the son failed, for want of disposition or ability, to pay the assessed value, the absolute title should still continue in him? Is it not clear that his design was to convert the land into money by the devise to the son, and if this purpose could not be thereby accomplished, then through a sale by the executors?

If it had been the intention of the testator that the son should take the land as an unconditional devise, why was its value to be assessed, and a credit given for the payment? The will does not provide for any account of advances made to the children. On the contrary, the testator declares that by property advanced and embraced in it, he had made his children nearly equal, and his desire to continue that equality is expressed.

The scheme, too, of the will, seems to favor that intent. In the disposition of his slaves, including those bequeathed to his wife for life, the son, John W. Kelly, whose devise was not subject to any condition, was excluded. We may well assume that it was, because the devise to him and his children was not incumbered with any condition.

The argument on the part of the appellee is, that W. H. Kelly did not *decline* to take the land, and that, therefore, one of the events on which the alternative disposition depended, did not occur. The power, however, of the executors to sell was not to be lost by his mere willingness to accept; it could not be extinguished by his acceptance and payment.

If no credit had been fixed by the will, the payment would have been a condition precedent to the vesting of the title; and is the enjoyment of the devise to be retained beyond the period at which the credit terminates, when the intent of the will is that its continuance shall depend on the payment by the devisee of the appraised value?

It cannot be contended that the acceptance of the notes amounted to payment. The authorities in this State are to the effect that a note taken does not amount to satisfaction, unless it is so agreed and understood by the parties; and unless such be the understanding, it is rather to be regarded as a memorandum or acknowledgment of the amount ascertained to be due. *Barrelli, Torre & Co. v. Brown & Moses*, 1 McC. 449; *Costello v. Cave & Bradley*, 2 Hill, 528; *Kelsey v. Holsted & Rosborough*, 2 Rich. 244; *Bank v. Bobo*, 9 id. 318; *Heat v. Fraser*, 2 Strobb. Eq. 250.

The devise by the fifth clause to Mrs. Harriet S. Hodges, so far as it attaches terms and conditions on which the continuance of the proposed bounty was to depend, must be governed by the same construction we have given to the devise to the said W. H. Kelly, under the second clause.

It is ordered and adjudged, that so much of the decree of the

Johnston v. Charleston.

chancellor as declares that the plaintiffs have no lien on the plantation on which the testator resided at the time of his death, for the sum of \$12,210, the amount at which it was appraised, and interest, and that they have no lien on the plantation devised to Harriet S. Hodges, for the payment of the \$3,000 for which she was to account to the estate, be reversed.

It is also ordered, that the case be remanded to the Circuit Court for Union county, that such orders may be had as are necessary to carry out the judgment of this court now pronounced, and to give full effect to so much of the circuit decree as has not been made the subject of appeal.

WILLARD, J., and WRIGHT, J., concurred.

JOHNSTON V. CHARLESTON.

(S. C. 222.)

Municipal corporation — liability for failure to keep streets in repair.

Where a municipal corporation is charged by law with the duty of keeping in repair the streets and sidewalks within the corporate limits, want of ordinary care is the true measure of its liability, when it is charged with having caused the death of a foot passenger by its negligence in not keeping in repair a cellar door forming part of the surface of a sidewalk.

ACTION by Mary Johnston, widow and administratrix of James Johnston, deceased, against the city council of Charleston, to recover damages for the death of the intestate, caused, as alleged, by the negligence of defendant in not keeping in safe and good repair a cellar door, forming part of the surface of a street within the city.

So much of the case as relates to the questions considered by this court was this :

Queen street is a street within the corporate limits of the city of Charleston, having a sidewalk for foot passengers, part of the surface of which consists of a cellar door on the premises of Mrs O'Neal. On the 15th of March, 1870, the intestate was going along said sidewalk as a foot passenger, and, when he reached the cellar door, it broke under him, and he fell through it. His thigh was broken by the fall, and he died on the 21st of March, six days afterward:

Evidence was given by the plaintiff for the purpose of proving that the door was rotten and unsafe at the time of the accident, and by the defendant to prove that it was sound, safe and in good condition, and that it had been examined by the chief of police shortly before the accident, who discovered no unsoundness, and pronounced it sound, secure and safe.

At the conclusion of the argument, the counsel for defendant requested the presiding judge to charge as follows :

1. That the cellar door upon the sidewalk in Queen street, where James Johnston is alleged to have been injured, was a lawful structure, that is, it was lawful for the city council to have or permit a cellar door there.

2. That if the jury find that the injury to said Johnston occurred from a latent defect in said door, then the city council cannot be held responsible to the plaintiff for any injury to said Johnston, unless the city council had express notice of such defect.

3. That the city council, without express notice, cannot be held responsible for any defect in said door, unless the defect was so notorious as to be evident to all who had occasion to pass that place.

4. That the city council cannot be held responsible unless the accident occurred wholly through their negligence, and in no part through the negligence of said Johnston.

5. That as to the safety of said cellar door the city council were bound to exercise only ordinary care and diligence.

Thereupon, the court charged as follows :

Gentlemen of the Jury : The fact of your going to visit these premises has made my observations upon the law few and simple.

The court will say that that cellar door was a lawful structure ; that it was lawful for the city council to put it there. And, also, that, in case any latent defect existed, the council will not be responsible. But what is a latent defect ? You have been to see that cellar door and can judge. A latent defect is one that cannot be discovered by a careful examination. Suppose the city council appointed an improper officer to go and see that door, and he merely looked at the outside, and there was a defect in the inside. That would not be a sufficient examination to relieve the city council, if there was such a latent defect. If, by a careful observation, it could not be discovered, then the city council is not responsible ; but a mere casual observation, if there was a defect existing in that door, which, by careful observation, could be discovered, will not relieve

the city council of their responsibility ; they would then be responsible.

As to the request of counsel for the defense, that the court shall charge that this defect must be so notorious that all passers-by can observe it, that is not good law, gentlemen of the jury. If a defect existed in this cellar door, which, by careful observation (which the city council was bound to give), could have been seen, and an accident had occurred thereby, then the council are responsible ; otherwise they are not responsible.

As to the fourth request by the counsel for the defense, that if the accident occurred by the fault or neglect of the deceased, why, certainly, he must answer for his own fault. But there is nothing in the testimony to show that. There is nothing in the testimony to show that the accident occurred from any fault or neglect of this unfortunate man. But you might consider this question, and if the jury think that because he died, therefore greater damages ought to be given him, then, you can take into consideration the fact that, perhaps, he may have contributed to his death, but not to the accident.

I don't know whether it is necessary for me to say that the city council is liable for ordinary or only for extraordinary care ; but in this particular case, if any defect exists in that cellar door, which a careful examination would discover, they are liable. And it was the duty of the city council to examine these bars, to see that they were strong enough.

The defendants herein excepted to the refusal to charge as requested, and also to the charge, as follows :

1. They except to that portion of said charge, whereby the jury were instructed that "a latent defect is one that cannot be discovered by a careful examination."

2. They except to that portion of said charge whereby the jury were instructed that, if there were a defect in the cellar door, which, by careful observation, could be discovered, a casual observation would not relieve the city council of responsibility.

3. They except to that portion of said charge whereby the jury were instructed that it was the duty of the city council to examine the bars (under the door) to see that they were strong enough.

4. And these defendants except to the refusal of the court to charge as requested, as follows: That the city council, without express notice, cannot be held responsible for any defect in said

door, unless the defect was so notorious as to be evident to all who had occasion to pass the place.

5. And these defendants except to the refusal of the court to charge as follows, as requested: That as to the safety of said cellar door the city council were bound to exercise only ordinary care and diligence.

The jury found for the plaintiff \$1,850.

The defendant moved to set aside the verdict, and its motion being denied, it appealed to this court.

Corbin, city attorney, for appellant. I. The cellar door, in Queen street, having been admitted to be a lawful structure, the court erred in refusing to charge that the city council, without express notice, cannot be held responsible for any defect in said door, unless the defect was so notorious as to be evident to all who had occasion to pass that place. *Shearm. & Redf. on Neg.*, §§ 147, 148; *Mayor v. Sheffield*, 4 Wall. 189; *Griffin v. The Mayor of New York*, 9 N. Y. 456; *Wallace v. Mayor of New York*, 18 How. Pr. 169; *Wightman v. Cor. of Washington*, 1 Bl. (U. S. S. C.) 52; *Bacon v. City of Boston*, 3 Cush. 174; *Winn v. City of Lowell*, 1 Allen, 177; *Wendell v. Troy*, 39 Barb. 329; *Congreve v. Morgan*, 5 Duer, 495; *Davenport v. Ruckman*, 37 N. Y. 570; *Nebraska City v. Campbell*, 2 Bl. (U. S. S. C.) 590; *Cooley's Const. Lim.* 249; *Hart v. Brooklyn*, 36 Barb. 226.

II. The court erred in refusing to charge: That as to the safety of said cellar door, the city council were bound to exercise only ordinary care and diligence.

Upon this request the court said: "I don't know whether it is necessary for me to say that the city council is liable for ordinary or only for extraordinary care, but in this particular case, if any defect exists in that cellar door, which a careful examination would discover, they are liable."

This plainly indicates more than "ordinary care and diligence." The defendants were entitled to the charge as requested. *Shearm. & Redf. on Neg.*, §§ 149, 349; *City of Prov. v. Clapp*, 17 How. (U. S. S. C.) 151; *Winn v. City of Lowell*, 1 Allen, 177; *Raymond v. City of Lowell*, 6 Cush. 524; *Willard v. Newbury*, 23 Vt. 458; *Lobdell v. New Bedford*, 1 Mass. 155; *Hilliard on Torts*, vol. 1, 115, § 38; *id.*, vol 2, 390, § 9.

Phillips, for respondent.

Johnston v. Charleston.

WILLARD, J. The action was brought, under the statute, by the plaintiff, as the widow of James Johnston, deceased, on account of injuries received by the said James Johnston, by falling through a cellar door forming part of the sidewalk of Queen street, and causing his death, on the ground that the cause of the injuries was the negligence of the defendants, a municipal corporation, in suffering the cellar door to be in an insecure condition, rendering the passage way unsafe for foot passengers.

The jury rendered a verdict for the plaintiff, under instructions by the court, to which exceptions were taken, both as to matters charged and refused.

Two propositions are advanced by the exceptions: first, assuming the liability of the defendants, for injuries through their negligence, in not keeping the sidewalks in safe repair, and assuming that the sidewalk, at the place in question, was not in a due state of repair, as it regarded the safety of foot passengers. that the defendants are not liable unless either express notice of such defect is shown, or unless the defect was so notorious as to be evident to all who had occasion to pass the place; and, second, that they are only liable for the want of ordinary care and diligence.

These propositions, as will be seen, involve different measures of responsibility; but if either affords the correct measure applicable to the case, then the court, as requested by the defendants, was bound to submit such proposition to the jury, and failing to do so is error.

The charge contains the following language: "I don't know whether it is necessary for me to say that the city council is liable for ordinary, or only for extraordinary care; but in this particular case, if any defect exists in that cellar door, which a careful examination would discover, they are liable."

The charge contains other observations bearing on the same point, but the language above quoted may be regarded as fairly embodying the view of the law, under which the jury found their verdict.

The true rule of liability is that contained in the last proposition advanced by the defendants, that they were bound only to ordinary care and diligence, as it regards the safety of the passage way over the cellar door. The cellar door in question formed part of the surface of the sidewalk, used by foot passengers for the purpose

of passage, and was within the duty of repair, as incumbent on the city council.

The verdict must be regarded as consistent with the idea that the structure in question was a lawful structure, inasmuch as the jury were so charged. Or, in other words, that the occurrence of this cellar door, as part of the surface of the passage way, in its connection with the user of the open space beneath it, by the owner of the adjacent property, as means of access to the lower portion of his premises, was not a nuisance or unlawful obstruction of the common highway. Nor can the verdict be questioned in this respect, as no exception appears to have been taken on that account by the plaintiff.

There is no good ground to doubt the correctness of this view. In the case of *Wendell v. Troy*, 39 Barb. 329, referred to by the appellants, the proposition was advanced, that "in regard to streets and highways, their use is designed for the public for the purpose of passage, travel and locomotion, and the use of them by an individual simply for his own convenience and accommodation, unaccompanied with the public user just mentioned, as for drains, sewers, vaults or cesspools, is unauthorized, and essentially a nuisance, and makes the party building or maintaining such nuisance liable for all damages sustained in consequence of the improper appropriation of the street or highway to such mere personal use."

If this is sound, it would follow that, when such user is authorized by the city, the latter would become liable, to the same extent as the person actually creating the nuisance; such was the view taken in that case, the city of Troy being held liable for damages resulting from the caving in of a private drain, laid under a public street, without regard to any proof of particular negligence on the part of the city.

The conclusion, in the case last cited, rested upon the erroneous assumption that individuals could not rightfully acquire, or hold, any personal interest, privilege or license in either the surface or soil of a public street.* This proposition is not true of a country

* The case of *Wendell v. Troy* was affirmed by the Court of Appeals (4 Abb. Ct. of App. Dec., 563); but the proposition that it is unlawful for a citizen to use the public streets for the purpose of connecting his premises with the main sewers of the city was not concurred in. See, also, *Barton v. Syracuse*, 24 N. Y. 54. — *Em.*

highway, for such an interest may be enjoyed, either by the owner of land adjacent to the highway, or by the grant or license of such owner, although subject to the common and public user of the highway, as such. City streets are highways, having certain peculiar attributes; the ownership of the soil of the street may be vested in the municipal corporation, instead of in the adjacent owner; and the user, itself, is more comprehensive, both as it regards the surface and the soil beneath it. A street is, ordinarily, designed as a means of affording passage, transportation, light, ventilation, drainage, and access to the particular dwellings abutting upon it. The right of user is not limited to the surface, but extends to the soil beneath the surface, and has been termed an "*urban servitude*."

Without limiting the extent to which the public may claim an exclusive right to the actual occupation of the surface of the soil, it is safe to say, that when the soil beneath the surface is not needed for any such public purpose or common user, it may, subject to the license and consent of the corporation, be used by the adjacent proprietor for a purpose not inconsistent with the public and common right of user, and which affords to him a peculiar and personal advantage in respect to any of the foregoing objects, for which a highway is designed. In other words, he may, by the license of the corporation, have the right to lay a private drain under the street, or to have an open space or area for light and ventilation, or for access to his premises, provided the public and common user is not interfered with. When the ownership of the soil is vested in the city, it is clear that its license is equally good authority to justify such particular use by the adjacent proprietor. The foregoing view is sustained by *Chicago v. Robbins*, 2 Black (U. S.), 418; *Bacon v. Boston*, 3 Cush. 174.

Under the verdict, it must be assumed that the opening into which the plaintiff's husband fell was for a purpose within the class of general objects for which streets are designed, and that, although the adjacent proprietor was enjoying thereby a particular and individual advantage, yet that such enjoyment was justified by the license of the city.

The city was bound to see that the opening was properly covered. *Chicago v. Robbins*, 2 Black (U. S.), 418. It is not to be assumed or inferred that the structure designated to cover the opening was defective, either as to plan, materials or workmanship; on the contrary, it must be assumed, under the verdict, that the defect arose

subsequent to its construction, either through injury received, or by reason of natural decay.

Hence, it follows that the liability of the corporation must be considered solely under the duty to repair and keep safe. In such case their liability for the non-performance of such duty is measured by what ordinary care and diligence demands. *Weightman v. Washington*, 1 Black (U. S.), 39, places the liability of a municipal corporation, in such cases, on the same footing as that of a private individual. In *Winn v. Lowell*, 1 Allen, 177, it was held, in reference to the duty of repair, that "the city is not bound to take the highest possible care, but only ordinary care. They are not insurers against accident." *Shearm. & Redf. on Neg.*, § 149.

The charge, that "if any defect exist in that cellar door, which a careful examination would discover," the defendants were liable, should have been limited, by narrowing down the duty of the defendants in detecting the existence of such defect, to what was demanded by ordinary care and vigilance. As the charge stands, it might be interpreted as requiring the exercise of more than ordinary care.

It is in proof that means were taken by the defendants to ascertain the safety of the cellar door previous to the accident. Of the sufficiency of the means under the rule, the jury were entitled to judge. The charge could not properly relieve them of the duty of applying the facts to the rule of law requiring ordinary care. On the other hand, the request to charge that either express notice or a defect so notorious as to be evident to all who had occasion to pass that place, must be shown before defendants can be charged, is too broad to square with the rule of ordinary care and diligence.

One charged with the care of a machine or structure of such nature that the consequences of a defect might prove dangerous to life and property, is bound, by the rule of ordinary diligence, to a higher degree of care than a person charged with no such duty, though not compelled to look beyond the safeguards sanctioned by common use in such cases, as he would be if bound under the rule of extraordinary care.

The city, having the care of the streets, is bound clearly to a higher degree of care, as it regards obstructions, than a mere passenger along the streets busied with his own interests. Where the defendants are not bound, within the limits of ordinary care, to look for defects, in order to charge them with any such defects, notice of its existence must be brought home to them, either express

McCrea v. Port Royal Railroad Co.

or inferential, but it is too much to say that, when a defect is patent, they are under no greater responsibility to see it than a mere passer-by.

The charge is clearly defective in not presenting to the jury the true measure of the duty of defendants, out of which their supposed liability springs, namely, the exercise of ordinary care and vigilance in keeping the surface of the streets, including the structures forming part thereof, in repair, so as to be safe for passengers.

The judgment and verdict should, therefore, be set aside, and a new trial ordered.

MOSES, C. J., and WRIGHT, J., concurred.

MCOREA V. PORT ROYAL RAILROAD COMPANY.

(S. C. 321.)

Corporation — repeal of charter.

The Port Royal Railroad Company was chartered in 1857, and its charter was renewed in 1870. The charter of 1857 prescribed the mode by which lands might be condemned to the use of the company, and by a general act, passed in 1868, a different mode of condemning lands to the use of all railroad corporations was prescribed. *Held*, that the company must proceed in the mode prescribed by the act of 1868.

THE case is stated in the judgment of the court.

Verdier, for appellant.

Bell & Barnwell, contra.

MOSES, C. J. The Port Royal Railroad Company was chartered on the 21st of December, 1857 (12 Stat. 660), with all the powers, rights and privileges conferred on the Spartanburg and Union Railroad Company by its charter of December, 1847. 11 Stat. 479. The right of way which it might require from owners of land through which the road was to pass, was to be determined in the manner prescribed by section 6 of the "Act to authorize the forma-

tion of the Greenville and Columbia Railroad Company," which will be found in 11 Stat. 326.

On the 15th of September, 1870, application having been made by the Port Royal Railroad Company to his honor Judge PLATT, for the appointment of commissioners to appraise the lands of the appellant, Mrs. Jane McCrea, through which the line of the railroad was to run, an order was issued in conformity with the mode prescribed by the said section 6 of the charter of the Greenville and Columbia Railroad Company. The owner of the land then applied to the judge to vacate the said order, on the ground that the manner directed for the assessment and condemnation of the land was not in conformity with the existing law under which the right of way over the lands of persons and corporations should be taken for the construction of railroads and other works of internal improvement, as declared by the act approved December 22, 1868. 14 Stat. 89. His honor refused to vacate the order, holding that the course to be pursued must be according to the mode directed by the charter, and an appeal is taken to this court to reverse his judgment.

The judge placed his decision on the assumption that the charter constituted a contract with the railroad company, as to the mode by which the lands required by it should be taken for its use, and that it was not, therefore, in the power of the State to prescribe any other, or change or modify that which it had permitted. It is not perceived how any contract resulted from the charter which tied the hands of the legislature, in declaring the manner by which the land of the citizen should be taken for public use, for it is only on the principle of eminent domain, that the land owner could be compelled to yield any portion of her territory for the purpose of a railroad company. The right of the corporation is only in the nature of a qualified grant, to be enjoyed on due compensation being rendered, and the mode through which the land might be taken by the company remained subject to the pleasure and will of the State. It was, at most, but a change in the remedy, and did not at all conflict with the material right acceded by the charter, which was the power of subjecting private property to the use of the road. The act of 1868 did not impair the obligation of any contract. At the date of its passage, no right to the land in question had vested in the company. It declared a general law upon the subject, applicable to all persons or corporations "authorized by charter to construct a railway, canal, turnpike or other public highway in the

McCrea v. Port Royal Railroad Co.

State." There are no words restricting the particular mode therein directed to charters thereafter to be obtained. On the contrary, the provision refers generally to all charters, whether existing, or afterward to be conferred. The words "that when any person or corporation shall be authorized," etc., clearly includes the Port Royal Railroad Company, for they come directly within the description. See *Balt. & Susq. R. R. Co. v. Nesbitt et al.*, 10 How. 395.

If, however, it should be concluded that the mode to be followed by this company, for the assessment of the lands which may be necessary for its use, must be according to the form prevailing at the time of the grant to its charter, even then it is not free from the operation of the provisions of the act of 1868. Its charter being identical with that of the Spartanburg and Union Railroad Company, while the latter is exempt from the operation of the forty-first section of the act of 1841 (11 Stat. 138), "to incorporate certain villages, societies," etc., it is expressly declared that "nothing herein contained shall be construed to exempt the said company from the provisions of the said forty-first section, upon any future grant, renewal or modification of their charter." The said section is in the language following: "That it shall become part of the charter of every corporation which shall 'at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment or modification thereof (unless the act granting such charter, renewal, amendment or modification, shall in express terms exempt it), that every charter of incorporation granted, renewed or modified as aforesaid, shall at all times remain subject to amendment, alteration or repeal, by the legislative authority.'"

The Port Royal Railroad Company, by reason of its failure to comply with certain conditions of its charter, found it necessary to obtain an extension and renewal of it by the act of 1870 (14 Stat. 579), and its charter must be construed and exercised in accordance with the laws in force at the time of such renewal, in respect to corporations of the said character, even if inconsistent with those which prevailed at the date of the original charter, which is to be considered as amended so as to conform to the then existing laws.

The motion is granted, and the order referred to, of 15th September, 1870, is set aside.

WILLARD, J., and WRIGHT, J., concurred.

TRENHOLM V. CHARLESTON.

(S. C. 347.)

Municipal corporation — taxation by — medium of payment — effect of debt.

Under an ordinance to raise supplies, taxes were assessed upon plaintiff's property by a municipal corporation, and the treasurer of the corporation being about to enforce payment under the provisions of a general ordinance, requiring all taxes to be "paid in specie or in the notes of specie-paying banks," plaintiff offered as payment a debt, of equal amount with the taxes, due him by the corporation. *Held*, that the plaintiff had no right, legal or equitable, to compel the corporation to receive the debt as payment or satisfaction of the taxes, or as a counter-claim or as a set-off or discount.

Taxes of a municipal corporation are assessed under its political powers, and where its ordinance directs the medium of payment, such ordinance must be complied with.

ON March 12, 1844, the city council of Charleston passed a general ordinance "to regulate the collection of city taxes," etc., which provides "that taxes and assessments for the use and service of the city shall be paid in specie or the notes of specie-paying banks."

On October 14, 1848, the same council passed an ordinance directing the issue of city six per cent stock, to the amount of \$200,000, redeemable in twenty years, and the stock was accordingly issued.

In pursuance of an ordinance of the same council, passed March 22, 1870, entitled "An ordinance to raise supplies for the fiscal year ending December 31, 1870," taxes were assessed upon the property of George A. Trenholm, to the amount of \$1,614.85. By an ordinance passed February 24, 1870, the taxes to be raised for 1870 were all appropriated to certain specific purposes therein named, the payment of the stock issued under the ordinance of October 14, 1848, not being one of them.

George A. Trenholm was the owner and holder of stock issued under the ordinance of October 14, 1848, to the amount of \$1,614.85, which was due and unpaid, and the city treasurer being about to enforce payment of the taxes assessed upon his property as aforesaid, he offered the stock owned and held by him, as payment or satisfaction thereof. The city treasurer refused to receive the stock in payment of the taxes, and thereupon the said George

Trenholm v. Charleston.

A. Trenholm commenced this action against the corporation and two of its officers, the city treasurer and the city sheriff, to compel the former to receive the stock as a satisfaction of, or counter-claim to, the taxes, and to enjoin the latter from collecting the taxes.

The presiding judge made a decree dismissing the complaint with costs, and the plaintiff appealed.

Magrath & Lowndes, for appellant, cited City charter, act 1873, 7 Stat. 98; *Wat. on Set-off*, 41; *Gray v. Burnett*, 3 Metc. 522; *Concord v. Pittsburgh*, 33 N. H. 810; id. 522; *Wilson v. Lewiston*, Watts & Serg. 428; 4 Stat. 624; *State v. Gaillard*, 1 Bay, 500; *State v. Gordon*, id. 492; *Treasurers v. Cleary*, 3 Rich. 372; *Cooley*, 492; Code, § 173.

Corbin, city attorney, *contra*, cited *State v. Hunt and Pinckney*, 3 Strobb. 400; *Britton v. Mayor, etc., of New York* 21 How. Pr. 251; *Presbyterian Church v. Mayor, etc., of New York*, 5 Cow. 538; *Gossler v. Georgetown*, 6 Wheat. 593; *Graniteville Manfg. Co. v. Roper*, 15 Rich. 156; *Vassear v. Livingstone*, 13 N. Y. 257; 3 Bl. Com. 395; *Pierce v. Boston*, 3 Metc. 521; 1 Pars. on Cont. 5; *Wat. on Set-off*, § 37; 2 Kent's Com. 450, 477; *Greene v. Darling*, 5 Mason, 901; *Dade v. Irwin's Exrs.*, 2 How. 390; *Howe v. Sheppard*, 2 Sumner, 409; *Greene v. Darling*, id. 214; *Darlington v. Mayor, etc., of New York*, 31 N. Y. 193; *Haune v. Hood*, 1 S. O. 16; 1 Bl. Com. 91; 1 Kent's Com. 448; *Lindeay v. Commissioners*, 2 Bay, 38.

MOSES, C. J. The general power of the city council of Charleston to impose taxes is not controverted on the part of the appellant. Neither is any question made in regard to the character of the tax demanded. It is therefore to be assumed as rightly assessed.

An injunction, however, is claimed to restrain the enforcement of the execution for taxes against the plaintiff, and the penalty for non-payment thereof, and for a decree to compel the defendants to receive in satisfaction certain past due city stock.

The ordinance of the city council, entitled "An ordinance to regulate the collection of city taxes," etc., ratified on March 12, 1844 (*Eckhard's Comp.* 270), provides "that taxes and assessments for the use and service of the city shall be paid in specie or the notes of specie-paying banks." While this restriction on the

means through which the tax payer may meet the contribution which the city exacts of him for its use and purposes, is conceded to be within the legitimate power, either expressly granted, or by necessary implication conferred by the charter, it is claimed that a past due debt of the corporation, held by the plaintiff, may be set-off against the taxes now about to be enforced against him.

In the imposition of taxes by a municipal corporation, it exercises a legislative function derived from the grant of powers which the State has devolved upon it for the purposes contemplated by its charter. Many of these powers, as was said by Chief Justice NELSON, in a case to be hereinafter referred to, are of the kind and nature which appertain to a citizen in his individual character, and as to these, it is bound and controlled by the same rules which regulate private rights. Contracts which, through its charter and by-laws, it is permitted to make, bind it to the same extent as the like agreements between individuals would bind them. In the same manner would it be responsible for any breach of duty, or for a failure to observe the obligations imposed by its charter, where loss or damage is the consequence. There is a wide distinction, however, between the enforcement of rights against a State and a municipal corporation. Whatever obligations rest upon a State, as no process is effectual to make it a party to a judicial proceeding, the judgments of the court cannot reach or control it. The security of claims against a sovereign State rests upon its high sense of honor and moral obligation. The case of *Pinckney*, 3 Strobb. 400, so much relied on in the argument of the counsel for the appellees, fails of application to the points made by the pleadings before us, because there the purpose of the *mandamus* indirectly, but virtually, sought to recover from the State a debt claimed against it. The exemption which thus prevails in favor of a State in no way can be extended to protect a municipal corporation from suit, or to prevent a citizen, when sued by it, from setting up any legitimate subject of discount.

The rights of the corporation to impose and collect taxes does not rest upon a contract. It is not founded on any agreement based on mutual assent. "Taxes are burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes." *Cooley*, 479. Their imposition is an exercise of political rights, and carries with it the privilege of determin-

Trenholm v. Charleston.

ing the nature and character of the funds which shall be accepted for their payment.

The ordinance of 1844 was dictated by proper views of policy, and exhibits, on the part of those intrusted with the administration of the municipal affairs, a due regard to the confidence which was reposed in them. The means of sustaining the city government were to be secured beyond the possibility of failure, for, on the certain collection of the funds necessary for that purpose, the very existence of the corporation depended. The good of the many must be preserved, even at the expense of individual loss and sacrifice. There was a necessity for some provision by law through which the medium in which taxes were to be paid should be fixed, for, otherwise, the very object of taxation might be defeated. This requisition was foreknown to the tax payer, and, therefore, cannot be the subject of surprise or complaint on his part. The idea of certainty is necessarily connected with taxation. It is called, in Tamlin's Law Dictionary, title "Tax," "a tribute or imposition laid upon the subject, which, being certainly or duly rated, was wont to be yearly paid into the King's Exchequer. It differs from what is commonly called a subsidy, in this, that it is always certain."

The stock by which it was proposed to pay the tax was not issued until 1848, and when the plaintiff purchased it, he was admonished by the ordinance of 1844, that he could not make it available for the purpose he now proposed. Doubtless it would have acquired additional value, if it had been recognized as a currency applicable to such use.

Is the corporation bound to accept it? If the imposition of taxes or the direction of the currency in which they are to be paid was the exercise of legislative authority by the council, within the grant of their charter, they cannot be required to receive the stock offered in payment by the plaintiff.

In *Britton v. The Mayor, etc., of N. Y.*, 21 How. 251, it was held that the common council cannot tie up or embarrass the exercise of their public duties by contract or otherwise, so as to disable them from enacting any law that may be deemed essential for the public good. That they cannot limit their legislative discretion by covenant, and are not estopped from giving that answer. This, too, was in a case where the council had entered into a covenant for cleaning the streets, piers and wharves of the city.

It had been previously held, in *Presbyterian Church v. City of New York*, 5 Cow. 538, that a corporation cannot, by contract, abridge their legislative power. How far we may be impressed with the principles applied in these cases to contracts entered into by municipal corporations, and their performance not prevented by the interference of State legislation, we are not prepared now to say. They, however, are in point to show the extent to which such corporations are permitted to go, while in the exercise, under their charter, of which may be termed political power.

Taxes are raised to meet the current expenses of the city, and to pay claims which have been recognized, and for all of which appropriations are annually made.

The operation of the whole machinery of the city government depends on these appropriations, made with a corresponding regard to the amount of supplies to be raised. If they are to be diverted to objects foreign to, and not contemplated by their enactment, there is not a department of the city which might not be affected even to destruction, to say nothing of the losses and disappointments of those whose claims may have been admitted and ordered for payment by the council. There would be gross injustice in requiring the defendants to receive this stock in payment of the taxes for 1870, due by the plaintiff. The supplies to be raised by the tax for that year have all been set apart, by appropriations, to stated purposes. A specific application has been made of them, involving the direct and preferred rights of other parties, which, if not defeated, would at least be postponed, if the amount of money to be raised could not be reduced by the reception of any other medium in payment of the taxes assessed.

It is further submitted by the complaint that the stock due by the city is a legitimate subject of set-off, against the assessment and execution for taxes.

The provisions of the Code, section 173, do not apply to the counter-claim proposed. There is no connection between the tax assessed against the plaintiff and the debt in city stock, which he holds against the defendants. The right to tax rests on no contract, and, therefore, no cause of action arising on contract can be set off against it. The process for its collection does not rest in action but on mandate.

Neither can relief be afforded to the plaintiff in the matter of

State v. Rankin.

his proposed counter-claim through the rule which, in analogy to the doctrine of law in regard to set-off, prevails in equity.

The view that we have taken of the whole case precludes us from extending to the plaintiff's claim either the legal or equitable principles on which the rights of set-off depend.

The motion is dismissed.

WILLARD, J., and WRIGHT, J., concurred.

STATE V. RANKIN.

(S. R. C. 422.)

Nuisance — noxious vapors and noisome smells — where nuisance is produced by acts of another.

To cause a whole neighborhood to become sickly, by erecting a dam across a stream, thus causing the water to stagnate and corrupt the air, is a public nuisance, for which an indictment lies.

So also, it is a public nuisance, and indictable, if the pond, without causing sickness, produces smells and stenches, which render the enjoyment of life and property in the community uncomfortable.

If a mill pond, which has existed for seventy years, becomes a public nuisance by corrupting the air, causing disagreeable smells and sickness, the owner may be indicted.

One is not guilty of a public nuisance unless the injurious consequences complained of are the natural, direct and proximate cause of his own acts. If such consequences are caused by the acts of others so operating on his acts as to produce the injurious consequences, then he is not liable.

INDICTMENT against George W. Rankin for a public nuisance. The indictment contained three counts. The first charged that George W. Rankin, on the first day of January, in the year of our Lord one thousand eight hundred and seventy, at Anderson Court-house, in the county and State aforesaid, injuriously and knowingly did erect, or caused to be erected, a certain dam across Three and Twenty creek, a common and ancient water-course at Anderson Court-house, in the county and State aforesaid, by means

of which the water flowing into the creek was stopped, damned up and flowed back in and upon the surface of large tracts of adjoining lands, by means whereof the mud, wood, leaves, brush, and the animal and vegetable substances and other filth, collected and brought down the channel of said water-course, by the natural flowing of the waters, there became and were, during all the time aforesaid, collected and accumulated in large quantities in the channel of said water-course, and on the lands overflowed, as aforesaid, and the said mud, wood, leaves, brush, and the animal and vegetable substance, so there collected, as aforesaid, became, and were, and still are, offensive, and the waters became, and are, corrupted; and by means whereof divers nauseous, unwholesome and deleterious smells and stench did arise, so that the air was, and still is, corrupted and infected to the great damage and common nuisance of the good and worthy citizens of this State, there passing and repassing, dwelling and inhabiting, and against the peace and dignity of the same State aforesaid.

The second count charged that George W. Rankin, being possessed of a certain mill-dam at Anderson Court-house, in the county and State aforesaid, with their appurtenances, situate near and adjacent to the dwelling-houses of divers of the good citizens of this State, did on the first day of January, in the year of our Lord one thousand eight hundred and seventy- , and on divers days, before and since, unlawfully and injuriously permit the water of the mill-pond to overflow the adjacent lands, as well of others as his own, by means whereof the land so overflowed was rendered and kept marshy, and filled and covered with noxious weeds and putrid vegetation, whereby the air became corrupted and infected, to the great damage and common nuisance of the good and worthy citizens of this State, there dwelling and inhabiting, and against the peace and dignity of the same State aforesaid.

And the third count charged that George W. Rankin, on the first day of January, in the year of our Lord one thousand eight hundred and seventy- , at Anderson Court-house, in the county and State aforesaid, unlawfully and injuriously a certain and ancient water-course, called Three and Twenty creek, with earth, gravel and other materials, did obstruct, and stop up, by reason whereof the rains and waters that used to flow through the said water-course did overflow the adjacent lands, and remain and became putrid, stagnant and noxious, and did send forth unwhole-

State v. Rankin.

some and infectious damps, fogs and smells, whereby the air was greatly corrupted and infected, to the great damage of the health and endangering the lives of the good citizens of the said State, there inhabiting and dwelling, and against the peace and dignity of the same State aforesaid.

The case on which the appeal was heard is as follows:

The defendant was indicted for erecting and keeping a public nuisance, namely, a mill-dam and pond on Three and Twenty creek, in Anderson county. The indictment contained three counts. The first charged that the defendant "did erect or cause to be erected a certain dam," etc.; the second charged that the defendant "being possessed of a certain mill-dam, etc., did permit the waters of the mill-pond to overflow the adjacent land," etc.; and the third charged that the defendant "unlawfully, a certain ancient water-course with earth, gravel and other materials, did obstruct and stop up," etc. The defendant pleaded not guilty. The testimony showed very clearly a successive and continuous ownership, possession and use of the mill-dam, and valuable mills, for a period of over seventy years, by the defendant's grandfather, his father and himself; that the pond of water was wholly upon the defendant's own land, and the head of the mill-pond, or dammed water, was eighty rods distant from, and within, the defendant's line, crossing the stream above; the dam had always been of the same height, and located on the same site; it was renewed in 1859, and made a close dam; prior to the re-building, it had become rotten and decayed, and leaked so that the water was wasted, and at times was insufficient to propel the machinery. It was urged before the jury, on this proof, that much of the sand and mud which came down the stream passed through the dam and escaped, prior to its being re-built, and that after the new dam was built there was no escape of the mud, gravel and sand coming down the stream, which caused an accumulation of debris at the head of the pond, and flooded and overflowed the bottom land above, and caused the "stenches, smells," and sickness above the head of the pond. In the opinion of witnesses, the quantity of land covered by the water of the mill-pond was ten or fifteen acres, and had, probably, in the lapse of years, diminished; and that now, as heretofore, the water of the stream had a fall of about eighteen inches, and flowed in great part in the old channel, from the defendant's line above, to

the head of his mill-pond. No dead timber immediately around the pond, but willows and swamp growth.

Three and Twenty creek is formed by the junction of three streams, uniting at different points above the defendant's land, and varying in distance therefrom from a half to one mile. The creek is represented as creeping and sluggish below the dam, in its entire length, with few falls, and they of slight elevation. In A. D. 1860, the riparian proprietors, above the defendant's land, combining together, cut a ditch, beginning at a short distance above the defendant's line, and at a spot where a log for passing, known as the "foot log," crossed the creek. The ditch was commenced and sunk in the channel of the creek, to a depth of, perhaps, one foot below the old bed at the starting point; was ten feet in width, and extended in a straight line up the creek, without conforming to its windings, though occasionally sunk in the bed of the stream, for the distance of two miles or more, running up the different branches.

After the cutting of the ditch, the sand collected at its lower end, at the "foot log," which is now covered by sand, and, in time, accumulated so that the channel, at the end of the ditch, in which the water had formerly flowed, became choked, and higher than the adjacent banks. The water was thus forced over the edges of the ditch, or banks, permeated the adjacent low grounds, and collected in spots in small holes, or pools. The entire descent of the water, from Conner's Bridge to the forks of the creek (a half mile), was nearly nine feet; from the forks of the creek to "foot log" (one-fourth of a mile), from six inches to one foot; and from the "foot log" to pond (one-fourth of a mile), one to one and a half feet.

The low grounds adjacent to the ditch became wet (sodded), and unfit for cultivation. Gradually they were covered with vegetation; the timber upon the uncleared bottoms, on both sides of the ditch, died, fell and rotted upon the low grounds, and, at some spots, lay in the ditch. This condition of the low grounds extended up the creek, and smaller streams, far above the defendant's land, for a distance of two and a half miles, and within one-half mile of the residence of a party (Dr. Earle) whose family, and tenants residing on his place, and several families in the same neighborhood, adjacent to the said stream, increasing annually for several years, were alleged to have been afflicted with the malarial disease.

The defendant had no agency in cutting this ditch, nor in any

State v. Rankin.

way consented thereto. He refused permission to the proprietors of the lands above to extend the ditch through his own land — the eighty rods lying between his line, and the eddy water of the pond — giving as his reason for the refusal, it would “fill his mill-pond with sand.”

It was in proof that the proprietors above, before cutting the ditch, consulted men of scientific knowledge of such matters, and were informed the ditch would not accomplish their purpose, nor drain the low grounds. They acted, however, against this opinion, and cut the ditch.

The charge by the State against the defendant was, that the mill-dam had been a nuisance, inasmuch as it caused the flooding of the lands, the dying of the timber, and the accumulation of stagnant water, and putrid vegetable substances above, which caused malarial diseases.

There was much testimony upon the subject of malaria, and its qualities. The opinion of the physicians was uniform that its body or substance had never been detected by the senses; and that its existence was known and recognized only from effects and results. Some of the medical witnesses denied its existence, but the majority of them approved the theory of its existence, and those of them who were acquainted with the locality and condition of the low grounds testified they exhibited the elements that generate malaria.

Two or three of them testified that there was sufficient cause for malaria in the condition of the low grounds, near the house of Dr. Earle, three miles from the mill of defendant, where, it was alleged, much sickness had existed, and that the condition of the low grounds resulted indirectly from the obstruction of the stream by defendant's mill-dam.

All agreed that the mill-pond proper, being of long standing, with water covering the bed, would not produce disease, as would the low grounds, with their alterations of dryness and moisture, and decaying vegetable substances.

The physicians, generally, testified that the chills and fever, and bilious remittent fever, which prevailed around the mill-pond and low grounds, and near the three streams forming the creek, might, according to theory, be attributable to the unhealthy condition of the low grounds.

Until 1860, disease, in that neighborhood, had not attracted notice; indeed, up to that time, the neighborhood, called “Slab-

town," was famed for its health. After that time, occasional cases of chills and fever, and bilious remittent fever occurred, and, some witnesses believed, such cases had increased in numbers.

The large number of cases was in 1871, when a majority of persons in the vicinity of the low grounds were seized with diseases, alleged to be of malarial type. A number of families and persons, equally exposed to fever, escaped. And it was noticeable that the great amount of sickness was not near the pond, but in the locality of, and above, the low grounds, one or two miles up.

It was also in proof, as connected with the above, that disease of malarial character was more generally prevalent in 1871 than it had been ever known before, and was found to invade places which before had been wholly exempt from it, and where it could not be traced to any known local cause.

The State charged that the condition of the low grounds resulted directly or consequentially from the defendant's mill-pond and dam below; that the mill-dam was the cause of the dead timber, the wet and slobbered state of the land, and of the vegetation annually growing and decaying, which afforded the constituents by which malaria, producing disease, was generated. It was affirmed that this malaria affected the people with the various kinds of fever, and being, as alleged, traced to the mill-dam, as primary cause, constituted the mill-dam and pond a common or public nuisance.

The defendant, in reply, alleged that the condition of the low grounds was occasioned by the conduct of the prosecutor, and his co-actors, in cutting the ditch; that until the ditch was dug, the lands adjacent to the creek was not wet and slobbered, nor had the timber thereon died; that the fall and flow of water between the lower end of the ditch and the head of the mill-pond precluded the assumption that the mill-dam, or water in the pond, had any agency in producing the condition of the low grounds above; that at the most, if there was any agency, it was very remote; and that if the prosecutor and his co-actors suffered damage, it resulted from the consequences of their own act, either alone or in connection with the natural filling of the stream above, from the cultivation of the country.

On the part of the defendant, the following points were presented to the court as questions of law:

1st. That no indictment will lie, as the offense, if any, is a private,

and not a public nuisance; and if there be parties injured, their remedy is by action of law.

2d. That the third count of the indictment is vague and indefinite as to time and locality, especially the latter, and should be stricken from the indictment.

3d. That the evidence of sickness and disease should not be considered by the jury, inasmuch as there are no such allegations in the indictment, nor allegations connecting disease and sickness with "noxious air, unwholesome smells," etc., and the only proof to be considered should refer to the allegations of the indictment.

The court refused to rule as requested, or to sustain any of the points made, and sent the cause to the jury.

On the part of the defendant, the court was then requested to charge the jury upon the following points:

1st. "That repairing the old dam, and erecting a new one on the same foundation, and continued use, was the same as if it had been one dam all the while, provided the new dam is no higher than the old, and the water level is not raised."

2d. That the defendant, besides being the owner of the land on which the pond rests, is entitled to the benefit of at least *seventy years' user*, which gives him all the rights relating to property that either the State or individuals can give.

3d. That this long possession and user, while it does not absolutely protect him from an indictment for nuisance at the suit of the State, entitles him to an acquittal, unless the jury should be clearly of opinion that the mill-pond is the "*natural and proximate cause* of the smells and stenches" complained of.

4th. That the defendant should be acquitted, if the jury should be of opinion that the ditch or dead timber above the dam was the cause of the "smells and stenches" complained of.

5th. That, under the terms of the indictment, the defendant should be acquitted, if the jury should be of opinion that the timber in the bottom, above the dam, was killed either by the ditch, or by the natural filling up from the cultivation of the lands above, or from both combined.

6th. That, under the indictment, the defendant should be acquitted, if the jury should be in doubt as to whether the dam had *any indirect and consequential agency*, either by itself, or in connection with the ditch and dead timber above, in producing the "smells and stenches" complained of.

These propositions were read to the jury, and the court, substantially, ruled the 1st, 2d, 4th and 5th points; but as to the 3d and 6th points, ruled them, in modified form, so as to make them conform to the points stated on behalf of the State below, which were approved.

On behalf of the State, the following propositions and principles were submitted :

" We ask the court to charge that it is a fundamental principle of social, natural and municipal law, which prescribes to every one, in the use and enjoyment of his own property, the necessary limitation, that he shall not injuriously affect the rights of others; that if defendant's obstruction of Three and Twenty creek, by a mill-dam, has been the cause, either *directly* or *indirectly*, of producing such an effect upon the low grounds above, as to induce the engendering of *malaria*, humid atmosphere, or other poisonous quality in the atmosphere, *whereby* the people generally were made sick, and injured in the enjoyment of their lives and property, that then he has not so used his own property as to avoid injury to the rights of others, and he is guilty of "erecting and keeping up" a public nuisance; and the charges in the indictment are proved; and, concluding that they are so proved, it is no defense to say:

1st. That the dam and pond have been kept up in the same place for seventy years, or for any other length of time.

2d. Or to say that the people of the community remained healthy for sixty-nine years of the seventy years, if during the last year it became, and is now, a nuisance.

3d. Or to say that there are persons or families in the neighborhood who escaped the prevailing sickness. It is enough if they were generally sick.

4th. Nor is it a defense to say that the dam had been kept at the same height all the time, and defendant has done no physical act calculated or designed to injure the community; that if the mill-pond had become or caused a nuisance, every day the dam remained standing across the stream, was, in contemplation of law, an "erecting" by the defendant, and merely keeping it up is all the act that was necessary to render him "guilty."

5th. Nor is it in answer to say that the property is valuable to the defendant; that the testimony on that point is irrelevant; the value of the property of a citizen cannot be weighed in the balance against the health and lives of the whole community.

State v. Rankin.

If the defendant's mill-pond, either directly or indirectly, was the exciting cause of the sickness that has prevailed in the community, in greater or less degree, for several years, and particularly during the year 1871, and during the latter year the people generally were affected thereby, then he is guilty; and lapse of time, value of property, nor any other matter relied on, can avail the defendant."

The above propositions and principles, submitted on the part of the State, were read to the jury, and ruled as law.

Whereupon the defendant excepted.

Under the instructions the jury found the defendant "guilty."

The defendant appealed and gave notice that he would move the Supreme Court in arrest of judgment, upon the grounds taken on the circuit, and also upon the grounds:

I. That in none of the counts is any disease, or any disease by name, alleged to exist, affecting the inhabitants of the vicinity, and specified as being the result of, or connected with, the unwholesome or putrid air.

II. That, inasmuch as malarial disease was everywhere prevalent, there should have been allegations in the indictment, and corresponding proof, that any disease which affected the inhabitants, near the alleged nuisance, was the direct effect thereof.

III. That the description of the locality in the third count, to wit: "A certain and ancient water-course, called Three and Twenty creek, with earth, gravel and material, did obstruct and stop up," is defective and insufficient to support a verdict.

IV. That no judgment or abatement can be enforced, because the indictment contains no averment as to *the continuance* of the alleged nuisance.

And failing in that motion, then for a new trial on the grounds:

I. Because the presiding judge charged the jury that no lapse of time or prescription could, in any way, help the defendant, as against an indictment for public nuisance; although he had only used his own property, according to his title and prescriptive right, for at least seventy years, had done no physical act designed or calculated to injure any one.

II. Because his honor charged the jury, that if the sickness was produced by the dead timber, in the low grounds of the creek, miles above the dam, and the dam had *any agency* by itself or in conjunction with other causes, such as the ditch, or the natural

filling up from cultivation above, in deadening the timber, then the defendant was guilty of a nuisance.

III. Because his honor charged the jury that, in an issue of nuisance, or no nuisance, there was no difference between natural or proximate, and indirect or remote causes; that if the dam had *any* agency, direct or indirect, proximate or remote, natural or consequential, in producing the sickness complained of, the defendant was guilty of a nuisance.

IV. Because the verdict rendered, under the charge of his honor, is unsupported, either by the evidence, the justice, or the law of the case.

McGowan & Moore, and Thomson, for appellant.

Perry, solicitor, Whitner, Reed & Brown, contra.

MOSES, C. J. So much of the appeal as seeks to arrest the judgment cannot be sustained. It does not appear from the brief that any application to that end was made in the Circuit Court. It therefore comes before us an original and independent motion, which we have not the power to entertain. Const., § 4, art. 4; *State v. Bailey*, 1 S. C. 1; *Floyd v. Abney*, id. 114; *Elmore v. Scurry*, id. 139.

We must, therefore, limit our inquiry to so much of the appeal as claims a new trial for the alleged errors of law by the presiding judge of the court below. So far as the points presented to him as questions of law, or asked to be submitted to the jury as grounds of defense, are identical, or of a like character with either of the causes urged in arrest of the judgment, the defendant will substantially have the benefit of their consideration.

It is denied that the indictment will lie, as the offense, if any, is a private and not a public nuisance. Whether it is the one or the other depends upon the extent of its existence. If it annoys the community in general, and not merely some particular person, it is indictable and not actionable. 4 Bl. Com. 167; *Rex v. White*, 1 Burr. 337. Where the act is charged as in or near a highway, "*per quod* the air thereby is corrupted," it is punishable as a public nuisance. *Rex v. Papineau*, 1 Str. 686; *Carey v. Brooks*, 1 Hill, 367. If it affects the highway, and extends its hurtful influence so as to comprehend whole neighborhoods, the only remedy is by

State v. Rankin.

indictment, though one who has suffered a particular damage, beyond that which the public has experienced, may, in respect thereof, maintain an action. Bac. Abr., title Nuisance, D.; 2 Ld. Raym. 985. Here the charge is, that the defendant "did erect, or caused to be erected, a certain dam across Three and Twenty creek, a common and ancient water-course, by means of which," etc.

The third count is not very artificially drawn, nor, in fact, is the indictment framed in exact conformity with the most approved precedents, and yet it may suffice. The statement in the said count may save it from the charge of vagueness as to time and locality. The date of the offense is not material, if it is before bill found, and there is enough to inform the defendant of the nature and character of the charge, and of the place which is an incident of it, to enable him advisedly to prepare his defense. If it is stricken out, it is not perceived, in view of the first count, how the defendant could be benefited.

The point taken no way resembles that which was sustained in *State v. Graham*, 15 Rich. 310. There the indictment was "for obstructing a public landing," and the proof was the obstruction of a public road leading to the landing at a place within one hundred yards of it.

If it was intended on the part of the defense to make any question as to the introduction of testimony to show sickness and disease in the neighborhood, it should have been objected to at the time. Its admissibility depended on its competency, and this was conceded when no exception was taken at the time it was offered. It, however, can in no manner avail the defendant. To constitute a nuisance, as was said by Lord MANSFIELD, in *Rex v. White and Ward*, 1 Burr. 337, "it is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable."

In *Rex v. Neill*, 2 B. & C. (12 E. C. L.) 226, it was held "that to support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to health; it is sufficient if they be offensive to the senses." Independent, however, of the rule sustained by these authorities, it was competent, under the allegation in the several counts of damage, "to the persons there passing, repassing, dwelling and inhabiting," to introduce testimony to show injury to health, as a consequence more preju-

dicia than any alone obnoxious to the senses, because of its unpleasant odor, and not productive of sickness.

The right to property from long possession, either directly from the operation of the statute of limitations, or arising from the presumption of an original cession by grant, cannot be applied to sanction or uphold its use or devotion to the purposes not permitted by the State, either as affecting its own sovereignty or the rights of third persons. Chitty, in his 1st volume of Criminal Law, 160, says: "It has been repeatedly held that no length of time can legalize a public nuisance, although it may afford an answer to an action by a private individual;" and PARSONS, Ch. J., in *Town of Stoughton v. Baker et al.*, 4 Mass. 522, observes "that no laches can be imputed to the government, and against it no time runs so to bar its rights." See also *Hall v. Richards*, 9 Wend. 315.

While the long possession may confer a right to the land flowed, and all the proprietary incidents which follow the title to property, it cannot be set up as a bar to the abatement of a nuisance on behalf of the public. A right to violate the law is not to be presumed as allowed by the State itself, for this would be inconsistent with the very purpose for which it was created, and would involve an absurdity too violent to be entertained even for a moment.

The points thus made for the appellant, which we are at liberty to consider, have been examined and determined; it remains only to inquire whether the charge of the presiding judge, as to the acts of the defendant, on which his liability depended, was in conformity with the rules which are to be applied as the law of the case. It is recognized as a fundamental principle, necessary for the safety and protection of society, that no one, in the use of his property, shall injuriously affect the rights of others. While this is admitted, how far and to what extent the limitation is to operate on the consequences which may accrue to third persons from the lawful use of one's property, often presents an inquiry to be determined by nice and delicate discrimination. One is supposed to be capable of foreseeing the consequences of his own action, and must, therefore, be responsible for any wrong or damage which results from it; hence there is no doubt as to his liability for the natural and proximate results of a legal act, which is the source of injury to another. A distinction is made between an act in itself lawful, and one that is forbidden, whether *malum in se* or *malum prohibitum*, and they

will not be both subject to the same rules in regard to their effect in reference to the rights of others.

While it is true that the defendant would be liable if his obstruction of the creek, by his pond and dam, was in itself the cause of the injuries complained of, yet, if the consequences are to be attributed to the acts of others, so affecting his property that it becomes a public nuisance, it would not appear consistent with justice or propriety that he should be held to responsibility.

The mere erection of the mill and dam on his own land was no nuisance; and if results, though injurious, yet not proximate and direct, followed, because set in motion by the acts of others, either in cutting the ditch, which, by the accumulation of sand, choked the channel and raised it higher than the adjacent banks, thus forcing the water over the edges of the ditch or banks, and collecting it in pools or holes, or from the increased cultivation in the neighborhood, it would seem that the consequences are to be referred to an agency operating on the property of the defendant, for which he should not be liable, because not employed by him. They were not proximate or direct, in the legal sense in which those terms are understood. He must be held accountable for the unlawful effects which naturally or directly proceeded from his acts.

In civil actions fixed and adjudged rules have been adopted. On the criminal side of the court the authorities are few, and none that we have examined of express bearing on the question we are now considering. One is held liable to an action for a private nuisance, arising out of the use of his own property, because in such use he has infringed upon the rights of others. A conviction for a public nuisance proceeds upon the same principle applied to the public, and not to individuals. In civil cases, however, a defendant is not responsible for results, except such as are natural, proximate and direct. 2 Greenl. Ev., §§ 256, 636; *Watley v. Murrell*, 1 Strobb. 389; *Harrison v. Berkley*, id. 548; *Carey v. Brooks*, 1 Hill, 365.

In the case before us, the presiding judge did charge "that the defendant should be acquitted if the jury should be of opinion that the timber in the bottom, above the dam, was killed either by the ditch or by the natural filling up from the cultivation of the lands above, or from both combined," or "if the ditch or dead timber above the dam was the cause of the 'smells and stenches' complained of." We think, however, that he should have gone further and instructed them that if, in their opinion, the dam, in itself, or

Palmer v. Railroad.

conjointly with the pond, was the cause of the alleged injuries, the defendant should be convicted ; but if other causes, to which he did not contribute, and which did not arise from his agency, so affected the dam and pond, or either, as to produce them, then they were too remote to be ascribed to his act, and the verdict should be in his favor.

The motion for a new trial is accordingly granted.

WILLARD, J., and WRIGHT, J., concurred.

PALMER V. RAILROAD.

(S. C. 580.)

Carrier — ejecting passenger — exemplary damages.

Plaintiff was a passenger on the cars of defendants, a railroad company, under a contract to carry him from Charlotte, N. C., to Augusta, Ga., with the privilege of stopping at Columbia. His ticket was a through ticket from New York to Savannah, with coupons for the different roads — for defendants' road there being two, one from Charlotte to Columbia, and one from Columbia to Augusta. On the passage from Charlotte to Columbia, W., the conductor on the train detached both coupons, and gave plaintiff a conductor's check, which, by the rules of the company and the general usage of railroads, was good only for that trip. Plaintiff stopped at Columbia, and the next day took the train, for Augusta, in charge of J., another conductor. On this train, his ticket was again demanded, and on his exhibiting the conductor's check, and his ticket, without the coupon, to Augusta, was informed by J. that they did not answer, and that he must either pay the fare to Augusta or leave the train. He failed to pay, and was ejected from the train. *Held*, that the act of J., in ejecting plaintiff from the train, was wrongful, and that defendants were liable in damages therefor.

Plaintiff's rights grew out of the terms of his contract, giving him the privilege of stopping at Columbia. He did not owe defendants the duty of giving notice of his intention to stop, or of making inquiries as to the force and effect of the conductor's check; and if he failed to give such notice or make such inquiries, he was guilty of no negligence of which defendants had the right to complain. On the contrary, the duty of taking notice of and regarding his right to stop was owed by defendant's to him, and when conductor W. detached the coupon from Columbia to Augusta, he should have delivered in its place some token having the same force and effect.

Palmer v. Railroad.

A corporation may be made to respond in exemplary damages for the misconduct of its agent — as, for instance, a railroad corporation, for the misconduct of a conductor in ejecting a passenger from the train.

ACTION by George W. Palmer, plaintiff, against the Charlotte Columbia and Augusta Railroad Company, defendants — a railroad corporation owning a continuous line of road from Charlotte, N. C., to Columbia, S. C., and thence to Augusta, Ga., to recover damages for wrongfully ejecting the plaintiff from defendants' cars.

When the jury was called, defendants objected to the whole array, on the ground that the appointment of the jury commissioner, who acted in the selection of the jurors, though made by the governor, had not been confirmed by the senate, according to the act of assembly. This fact was admitted, but the court overruled the objection, and the defendants excepted.

The plaintiff gave evidence tending to show that early in June, 1871, he purchased from the defendants' ticket agent, in New York, a through ticket from New York to Savannah, Georgia, which, after all the coupons, except the last, were detached, was in words and figures as follows:

"Read the contract below — baggage limited to 100 pounds —
 Good until _____ 186____, inclusive,
 for one passage. New York to Savannah, Georgia, via Baltimore, Washington, Richmond, Weldon, Raleigh, Columbia, and Augusta.

" Coupons are good until date, after which they will be received at their par value in part payment of local fares, but will be forfeited if detached from the ticket. Passengers are privileged to stop only at points named on the coupons, and are prohibited from taking any thing as baggage but their wearing apparel. Eighty pounds of baggage only allowed to each passenger. All over eighty pounds to be paid for. The company limit their responsibility for baggage to a dollar per pound, and will not be liable for any amount beyond a hundred dollars, except by special contract. Each company will be responsible for the loss and damage only on its own line. Passengers are required to keep their entire persons inside of the cars while in motion. Passengers must claim their baggage upon arrival at the point to which they have it

checked. If not taken on its arrival, storage will be charged. Issued by the New Jersey Railroad."

"Augusta to Savannah, Georgia,

"Via Central R. R. of Georgia."

That when the plaintiff reached Charlotte there were, besides the coupon from Augusta to Savannah, two others on the ticket, one from Charlotte to Columbia, and one from Columbia to Augusta; that on Friday, June 9th, the plaintiff got on the train of defendants at Charlotte, and, in a few minutes after it started, he was called on by the conductor on the train, named Wolfe, for his ticket; that he produced it, and the conductor tore off the two coupons from Charlotte to Columbia, and from Columbia to Augusta, and, in place of the two coupons, delivered to the plaintiff a conductor's check, in words as follows:

"Job printing of all kinds neatly { Charlotte, Columbia and Augusta
executed at Observer's office, { Railroad.
Charlotte, North Carolina. { Please keep your feet off of the seats.

"M. M. WOLFE, Conductor."

On the reverse side were stations and distances.

That plaintiff informed conductor Wolfe that he desired to stop at Columbia, and was told by him that the check would allow him to do so; that plaintiff stopped at Columbia, remained there all night, and the next day, June 10th, took defendants' train for Augusta, and after it had proceeded about four miles, he was called on by the conductor, named Johnson, for his ticket; that he exhibited the check given to him by conductor Wolfe, and the ticket, as returned to him by that officer; that he was told they would not answer, and that he must pay the fare from Columbia to Augusta, or leave the train; that he protested against being compelled to leave — said he had no money with him, that he would pay when he got to Augusta, and offered to pledge his baggage as security; that the conductor then stopped the train and compelled him to leave it in a swamp, though he asked to be taken to the next station; that his baggage was put off at the same time; that he walked back to Columbia, taking his baggage with him — got wet in a thunder storm, and became much exhausted and feverish from the exposure and weight of the baggage; that the next day he again took de-

Palmer v. Railroad.

defendants' train for Augusta, and was allowed to pass on his ticket and conductor's check without paying the fare.

For the defendants, evidence was given tending to show that the plaintiff did not inform conductor Wolfe that he desired to stop in Columbia, and was not told by the latter that the check would allow him to do so; that the conductors on the road were under instructions to detach, before reaching Columbia, both coupons from all through tickets to which double coupons for the road were attached, and to deliver to each passenger wishing to stop at Columbia a "lay-over ticket;" that the general ticket agents had been instructed to issue no tickets with double coupons for the road; that, by the usage and custom of railroads, a conductor's check was regarded as nothing but a memorandum for himself, was good only for the train on which it was given, and was never recognized by another conductor; that when plaintiff's ticket was shown to conductor Johnson, the coupon from Augusta to Savannah had been torn off and was pinned to the ticket; that there was no swamp where plaintiff was compelled to leave the train, and that the day was clear, with no indications of rain; that the conduct of the conductor was not harsh, oppressive or cruel; that there was no house at the next station on the road, and that the weight of plaintiff's baggage was more than eighty pounds.

The jury found a verdict for the plaintiff of \$3,000, and judgment having been entered thereon, the defendant appealed.

Rions, for appellants.

Chamberlain, *contra*.

WILLARD, J. The defendants' first exception involves the proposition that under an objection to the array of jurors, it is competent to inquire into the title of the commissioner, by whom the jury was selected, to the office exercised by him. The existence and authority of the office are not questioned, but the title of the incumbent is the only matter in dispute. The validity of the array does not depend on the title of the jury commissioner to his office. While actually exercising the powers of the office, his official acts must have full force and effect.

The remaining exceptions involve these general inquiries, namely:

1st. What is the true construction of the contract expressed or implied by the passage ticket purchased by plaintiff?

2d. Is that contract affected by any thing in proof as to the general custom of railroad travel, or the particular rules and regulations of the defendants?

3d. Assuming the act of the conductor in removing the plaintiff from the train to be unlawful and moved by malice or recklessness, can the defendant be held responsible therefor in exemplary damages?

The plaintiff purchased a ticket of defendants' agents in New York, by the terms entitling him to a passage over the defendants' railroad from Charlotte to Augusta, with the privilege of stopping over at Columbia. The ticket contained separate coupons from Charlotte to Columbia, and from Columbia to Augusta. The conductor, between Charlotte and Columbia, separated from the ticket both of these coupons, retaining them, and giving the plaintiff a conductor's check. Plaintiff stopped over at Columbia, taking, on the next day, a train under charge of a different conductor from the one whose check he held. Plaintiff was expelled from the train by its conductor, on the ground that the conductor's check held by him did not entitle him to a passage in that train from Columbia to Augusta, and of his failure to pay the proper fare from Columbia to Augusta he demanded of him.

The second exception brings up the following instruction asked for by defendants, namely: "That, without some notice to the contrary, conductor Wolfe was justifiable in assuming that the plaintiff intended to go to Augusta without stopping at Columbia." The court refused this charge, and charged the contrary.

If this instruction had any bearing in the case it would result from the proposition that the plaintiff was bound to notify the conductor, at the time he removed the coupons to Augusta, that he intended stopping over at Columbia. According to the true construction of the contract, the plaintiff was at liberty to form the intention of stopping over at Columbia at any time before the train left that place for Augusta. The instruction, on the contrary, assumes that the intention should have been not only formed, but expressed, at the time the conductor removed the coupons between Charlotte and Columbia.

The conductor was bound to assume that the plaintiff intended to retain the right conferred by his contract, and in taking from him the evidence of such right, to place in his hands some token

Palmer v. Railroad.

that would, under the rules and regulations of the defendants, be equivalent to the possession of the coupons removed.

The instructions asked would have tended to mislead the jury as to the nature of the rights of the plaintiff under his contract, and was properly refused.

The sixth exception is directly connected with that just considered. The defendant asked an instruction, "that if the jury are satisfied that, by the usage and custom of railroads in the United States, a conductor's check is good only upon the train upon which it is given, then it was an act of negligence on the part of the plaintiff not to make inquiry of the conductor, who gave him the check, whether it would be good for another train." The court refused this instruction, and charged "that the plaintiff, in this case, was not bound to make an inquiry of the conductor, and was, therefore, not guilty of negligence; the peculiar contract, between him and the railroad company, devolved upon the conductor, and not upon the passenger, to make the inquiry. I do not think that the instruction applies to this case as made out by the evidence."

It has already been said that it was the duty of the conductor, in taking up the coupons, to place in the hands of the passenger some token that would have the force and effect, under the rules and regulations of the company, of the coupons themselves. Primarily, the passenger had the right to hold the evidence of his contract until it had been performed on the part of the defendants. Assuming that this right was modified, by the rules and regulations of the road, to the extent of rendering it proper for the conductor to demand that the evidence of his right, as to any portion of the journey secured by the ticket, should be surrendered before such portion was completed, the ground on which the reasonableness of any such regulation must rest is, the necessity and propriety of such a course for the protection of the company against imposition.

Having, therefore, demanded of the passenger the proper evidence of his contract for their own benefit, they were bound to put him in as good a position as if he had not parted with such evidence. The common practice is to substitute a conductor's check for the coupons taken up. This conductor's check is a mere token. It need not express the terms of the contract under which the passenger is conveyed. The passenger has the right to assume, without examination or inquiry, the due performance by the conductor of his duty in this respect.

What would be the effect, if the conductor's check contained words limiting in effect the right of the passenger, as existing under the ticket and coupons, in the event of the attention of the passenger being called to such limitation, whether in that case it would call upon him to assert the right thus affected, or be held to have abandoned it, is not a question in this case, for it does not appear that the conductor's check in question contained words of that character. While it is true that, if a passenger claims any thing under general usage, or under the rules and regulations of a particular road, in excess of what he has a right to demand under his contract, he must take it in subordination to such usage and rules. Yet, when his contract gives him a clear right, subject to no contingency, he cannot be deprived of that right, either under a rule established by general usage, or by the particular road, in the absence of timely notice of such rule. Applying these principles to the instruction asked, and the charge given in lieu of it, it is clear that the instruction asked was defective in charging the passenger with knowledge of the import of the check, upon the ground of general usage alone, and in making it a ground of negligence on his part, not to have inquired as to the import and value of the check. It is equally clear that the view taken by the court was correct, both as it regards the duty of the passenger and the conductor, and the inapplicability of the instruction to the case, there being no facts in proof tending to fix on the plaintiff a charge of neglecting any act essential to the preservation of rights under his ticket.

The seventh exception brings up an instruction asked by defendants and refused, which is as follows: "That if the plaintiff had a separate coupon from Charlotte to Columbia, and another from Columbia to Augusta, and he intended, at the time he was called upon by the conductor for his ticket, to stop over at Columbia, it was an act of negligence in him to allow his coupon from Columbia to Augusta to be torn off." The court declined so to charge, and charged the contrary. The eighth exception contains an instruction, asked and declined, as follows: "That if the plaintiff had a separate coupon from Charlotte to Augusta, then it was an act of negligence for him to stop over at Columbia without having been assured by the conductor that the check given him would pass him on another train." The sixth, seventh and eighth exceptions seek to charge the plaintiff with negligence. To give any meaning to the idea of negligence thus advanced, it would be necessary to suppose that at the

Palmer v. Railroad.

time when the conductor called upon the plaintiff for his coupons, some duty was imposed on the plaintiff, the negligent performance of which deprived him of his right to stop over at Columbia. According to the sixth exception, this negligence consisted in not ascertaining that he had proper evidence of his right to stop over. According to the seventh exception, it consisted in his allowing the conductor to take up the Columbia and Augusta coupon. If in either of these cases any negligence occurred, it was in respect to some duty that the plaintiff owed himself, and not as to any duty in which the defendants are concerned, and, therefore, it is not a matter that can be alleged by them as inuring to their advantage. The plaintiff had rights fixed under his contract, and unless his conduct amounted to an abandonment or modification of these rights, such as the defendants would take advantage of, it is unimportant whether he was vigilant or remiss in detecting an infraction of such rights. What might have been the consequence, had it been made to appear that the plaintiff took the conductor's check with knowledge that the conductor had committed an error, is not necessary to be considered, for there is no evidence tending to prove such a state of facts. If there was negligence in stopping over at Columbia without inquiry as to his right to resume his journey on the next day, it was not incident to any duty due to the defendants, and they cannot therefore complain of it. It is very clear that the conductor had no right to take up the coupon from Columbia to Augusta before Columbia was reached, unless he placed the plaintiff in as good a condition as before, by giving a check or token evidencing his right to stop over at Columbia, and to take a subsequent train; but this only leads to the conclusion that plaintiff had a right to assume that the conductor's check given to him was sufficient for that purpose. Such being the case, he was not bound to protest against or resist the removal of the Columbia and Augusta coupon.

The instruction asked, that is the subject of the ninth exception, is as follows: "That the regulation of the defendants, requiring a passenger, with a through ticket, who gives up his coupon to a point beyond another point at which he wishes to stop, to obtain from the conductor a lay-over ticket, is a reasonable regulation." This instruction was refused, "unless the regulation be accompanied by a farther regulation, that the conductor shall inform the passenger." It will not be necessary to examine the conclusions of the Circuit Court as to this instruction, for the regulation in question has no

application to the present case. It was obviously intended to cover the case of a passenger desiring to stop at some point intermediate to the initial and terminal point of a single coupon. In such a case we must assume that the right to stop at such intermediate point would depend on the regulations of the road, and not upon the contract which allows stoppages only at the points to and from which coupons run. It cannot be construed as applying to a case where the passenger has the right, by the terms of his contract, to stop at a particular place; nor can it be applied either to the initial or terminal points of a coupon. Neither can the regulations of the road consolidate the coupons into one, as against the right of the passenger, under the terms of his contract, to treat them as distinct parts of his journey.

The tenth exception questions the authority of the agent at New York to sell two coupons between Charlotte and Augusta. But the fact that the defendants recognized the ticket, and allowed the plaintiff finally to perform the journey called for by it, was such a ratification of the act of the New York agent as to render immaterial evidence of the nature of the instructions under which the agent acted. This instruction is unimportant to the case, for this reason. The charge, were it erroneous in this respect, could not have affected the verdict to the prejudice of the defendants.

The eleventh exception has no application to this case. The position of the plaintiff is, that under their contract the defendants were bound to convey him from Columbia to Augusta, after having stopped at Columbia. The entrance of the plaintiff into the train, with the portion of his ticket remaining in his hands, and a conductor's check from Charlotte to Augusta, was a clear demand for the performance of the part of the contract the breach of which is alleged.

The twelfth exception was charged as requested by the defendants, and is not before us for review.

The thirteenth exception is already disposed of by what has gone before.

That portion of the charge brought into view by the fourteenth and sixteenth exceptions, so far as it is applicable to the present case, is in conformity to the views already expressed, and is free from error.

The remaining exceptions, namely, the fifteenth and seventeenth, raise the question whether the rule of exemplary damages was ap-

appropriate to be submitted to the jury. If the defendants could, under no such circumstances, be subjected to exemplary damages for the misconduct of the conductor, or, if there were no facts in the case to characterize the conduct of the conductor as malicious, oppressive, or reckless of the rights of the plaintiff, then the submission of the rule of exemplary damages was erroneous, as it would tend to mislead the jury as to their duty in the case.

The question, whether a corporation is liable to respond in exemplary damages for the misconduct of an agent, has not been settled in this State. It will be considered on reason and authority, so far as it affects the relations of a common carrier to his passenger, where there has been an abuse of authority over the person of the passenger, conferred by the carrier upon his agent, acting in his stead in the performance of the contract to convey with safety. The right of a common carrier to eject a person from his conveyance by personal force can have no other foundation than that which justifies the lawful occupant of a house from ejecting therefrom, in like manner, an unlicensed intruder or trespasser. It is a consequence of dominion over property. As the exercise of this right, accompanied with force, involves a restraint of the liberty of another, it is a delicate power that should be scrupulously guarded from abuse. The imposition of exemplary damages is a means peculiarly fitted to prevent abuses of this power, and, when applied to cases of this character, ought to be regarded as accomplishing more than merely setting an example for the benefit of the community at large, and as covering redress of an injury to the right of personal liberty distinguishable from all that class of personal grievances properly embraced within the legal rule of compensatory damages. Where such powers are delegated, the sanction under which they are exercised should not be diminished. Nothing would be more dangerous than to allow such powers to be conferred on an irresponsible person, possibly a ruffian, leaving the person communicating such authority exempt from part of the legal consequences that ought to be attached to their abuse. If public policy allows exemplary damages, in order to deter persons clothed with such authority from abusing it, there is equal reason for allowing them as a penalty for the delegation of such powers to an improper person.

It will be found, upon examination of the authorities, that while much difference of opinion has been called forth by the discussion

Palmer v. Railroad.

of the general question of the liability of corporations to exemplary damages, for the misconduct of agents, yet that no case is in conflict with the limited basis of the question above stated. *Goddard v. Railroad*, 57 Me. 202; S. C., 2 Am. Rep. 39. In this case the general liability of a railroad company, as a common carrier, for misconduct of an agent toward a passenger under his charge, is established to the extent of allowing exemplary damages. The same rule was applied in *Railroad v. Dunn*, 19 Ohio St. 162; S. C., 2 Am. Rep. 382.

Ward v. Railroad, 17 N. Y. 362. In this case the question of exemplary damages was not considered by the Court of Appeals, though it appears to have been raised by plaintiff on the trial. *Railroad v. Hinds*, 55 Penn. 512. This case holds that it is the duty of the railroad company to protect the lives and persons of passengers, as against riotous conduct of other passengers, so far as the means are at hand so to do. The concurrence in the common carrier of a certain right of control over the person of his passenger, with the duty of protecting him from unlawful force from third parties, is suggestive of a relation calling for the application of the rule, *qui facit per alium facit per se*, carried to its fullest extent, so as to transfer to the principal all the legal consequences that ought to flow from the act of the agent.

Railroad v. Jinney, 10 Wis. 383. This case has been regarded as an authority against the allowance of exemplary damages against a corporation for the act of its agent, without proof of direct authorization or ratification; but such is not the effect of the case. The refusal to apply the rule of exemplary damages, in that case, was based on the fact that the conductor had no authority to remove passengers from the cars, the court holding that such delegation of authority must be proved, and could not be inferred from knowledge of the general practice of railroads. This case is in strict accord with the idea that where such a delegation of authority exists in the hands of an agent, liability to exemplary damages, on the part of the principal, will follow an act of gross, malicious or wanton abuse in the hands of such agent.

Turner v. Railroad, 34 Cal. 594. The rule of exemplary damages was refused in this case, on the ground that it did not appear that the defendant had either authorized or ratified the act of the conductor. It does not assume the position that a special act of authorization or ratification was essential. It is entirely consistent

Palmer v. Railroad.

with the idea that a general delegation of authority would support the application of this rule. On examining the report of the case, it will be observed that it does not appear, anywhere, that the conductor had authority to remove passengers from the cars. The case cannot be hostile to a proposition that announces, as the basis of its conclusion, that there must be a delegation of power of control over the person of the passenger.

Hill v. Railroad, 11 La. 292. The rule of compensatory damages laid down in this case was strictly applicable to the case, there being no circumstances to justify the allowance of exemplary damages.

Amiable Nancy, 3 Wheat. 546. Exemplary damages were refused in this case, as against the owners of a privateer, for an injury unlawfully committed by the privateer while under the control of the agent of such owners. This decision is based on the peculiar nature of the privateering service. It is enough to distinguish that case from the principle under consideration, that where the powers exercised by the agent were war powers, not derived from the owners of the vessel, but from the government under whose laws the vessel sailed. An abuse of such powers would lead to different consequences, from an abuse of powers belonging, of common right, to common carriers.

Railroad v. Quigly, 21 How. 202. Exemplary damages are allowed against a corporation for the malicious publication of a libel, under authority of its board of directors. Directors can be regarded in no other light than as agents of the corporation; and it is impossible to avoid the conclusion that this authority upholds the general proposition that a corporation may be held responsible in exemplary damages for the malicious act of its agents done in the course of its business.

Thus it will be found that the current of decisions supports the proposition under consideration.

It is clear that there were circumstances rendering it legally possible that the jury might conclude that the conductor, in removing the plaintiff from the train, was influenced by an intent to injure, degrade or oppress him. Among these circumstances are the facts that the ticket and check, exhibited to the conductor, tended to show that it was a case of mistake, and not of a design to defraud the company; that the plaintiff exhibited willingness to do all in his power in order to accede to what he considered an unjust de-

mand ; for, although without money to pay the fare demanded, he offered to secure its payment by pledging his baggage ; and the fact that the plaintiff was put off at an inconvenient place — the jury had a right to say whether the act was reasonable and wholly influenced by a sense of duty to his principal, or whether it was a harsh and tyrannical exercise of authority, conceived in a spirit of hostility or prejudice against the plaintiff, or in a reckless and wanton disregard of rights respected by the humane spirit of our laws. Power to remove a passenger from a public conveyance should be lodged in the hands of the persons in charge of such conveyances. But it ought always to be regarded as the last resort, and its exercise ought not to be justified where all considerate and just minds revolt from it as an act of cruelty. All the powers of common carriers over their passengers are subject to the limit of reasonableness, and an act that offends the sense of public justice and propriety cannot be justified as a lawful exercise of the authority of a common carrier over the person of his passengers. The rule of exemplary damages was proper to the case. There being no error in the rulings or charge of the Circuit Court, the motion for a new trial should be denied, and the appeal dismissed.

MOSES, C. J., and WRIGHT, J., concurred.

PORTER V. SOUTHERN EXPRESS COMPANY.

(4 S. C. 125.)

Carrier — limiting time for commencing action against an express company.

AN express company gave a receipt for goods containing a clause exempting it from "any loss or damage whatever, unless claim should be made therefor within ninety days from the delivery to it." *Held*, that an action against the company for non-delivery of the goods was not barred by the lapse of ninety days.

ASSUMPSIT to recover the value of goods delivered to the defendant on the 12th of March, 1864, to be transported and delivered to the plaintiff at Charleston, but which defendant failed to deliver. At the time the goods were delivered the defendant's

Porter v. Southern Express Co.

agent gave plaintiff a receipt providing among other things that the company was not "to be held liable for any loss or damage whatever, unless claim be made therefor within ninety days from the delivery to it." This action was commenced in April, 1867. The plaintiff had a verdict, and judgment having been entered thereon, the defendant appealed.

Brewster, Spratt & Burke, for appellants.

Porter & Conner, contra.

WILLARD, J. The first ground of exception presented to the refusal of the Circuit Court to grant a nonsuit involves the proposition that a receipt and memorandum of agreement, issued by an agent of an express company, acknowledging that certain goods had been intrusted to such company for conveyance to a designated point, and for delivery to the party seeking to enforce it, is not evidence in itself to bind the company, although the authority of such agent to bind the company, by its terms, was fully shown. The proposition of the defendants is, that the receipt and memorandum of agreement is to be regarded, as to its competency as evidence, as a declaration of an agent, and as such is not in itself admissible, but the matters set forth must be affirmed by the testimony of the witness under oath.

The receipt and memorandum is not in itself a contract, and having been made by one authorized to bind the defendants in that manner, is entitled to be received as evidence on the same footing as all other contracts in writing.

The second exception to the refusal to nonsuit misconceives entirely the relation that the proof given in the trial sustains to the pleadings. The declaration alleged an express contract on the part of the defendants, as carriers for hire, to convey certain goods to a designated point, and deliver them to the plaintiffs. The receipt and memorandum produced proved the existence of such a contract, and consequently supported the averments of the declaration. The proposition of the defendants, that the receipt was not of itself evidence to support a charge of a breach of the common-law liability of a carrier, has no meaning or significance as it regards the issue made by the pleadings and the bearing of the proofs upon that issue. The receipt and memorandum of agreement tended to prove the

fact alleged by the declaration that the goods were delivered to the defendants for conveyance, and, as such, it was competent under the pleadings.

No ground is presented for interfering with the refusal of the court to grant a nonsuit.

The first instruction prayed by the defendants is a repetition, in other words, of the same proposition embodied in the second exception to the ruling refusing a nonsuit. It is not necessary for the plaintiffs to resort to the "implied obligations of common carriers," to make out their case. They prove an express contract to convey the goods to Charleston, and to deliver them to the plaintiffs, founded on a valuable consideration, duly set forth. It is enough for them to show that the goods were not delivered to them according to the contract, in order to establish a breach. The proposition advanced by the defendants has no bearing on the case, and need not be considered as to its intrinsic merits.

The second instruction prayed misconceives the meaning of that clause of the receipt, which is in the following language: "Nor is it to be held liable for any loss or damage whatever, unless claim therefor be made within ninety days after the delivery to it." The view of this clause, taken by the defendants, is, that it operates as a limitation on that part of the contract that requires the delivery at the designated point of the same articles delivered to the defendant for conveyance. The effect of this would be that by the terms of the contract the defendants would be bound in general terms to deliver to the plaintiffs at a certain point, and yet the plaintiffs would not be entitled to enforce such obligation unless demand therefor was made within ninety days. It is not to be presumed that language employed in a contract was intended to impose obligations on one of the contracting parties, and yet not to create rights of a corresponding character in the other party. Certainly language that will reasonably bear any other construction should not be allowed to have such effect. If the construction contended for by the defendants is sound, then the ninety day clause was intended to operate with force and effect like that of the statute of limitations upon the plaintiff's right of action arising on a breach of the express contract to convey and deliver. We must exclude all other reasonable constructions before ascribing to the parties such an intent.

The clause in question is the concluding sentence of a paragraph,

Porter v. Southern Express Co.

distinct and separate from that part of the contract which requires delivery to the plaintiffs. The subject-matter of this paragraph is the extent and measure of the liability of the defendants, in the event of the goods becoming damaged or lost while in the hands of the defendants. The clause in question must be regarded as intended to apply to such a case.

As there was no evidence introduced, by either party, tending to show that the goods were either damaged or lost while in the hands of the defendants, the clause in question had no bearing on the case, and the refusal of the circuit judge to give instructions involving a construction of the true meaning and import of this clause, was free from error. In the present case, the charge is, that thirteen distinct packages, out of a larger lot, delivered to the defendants for conveyance, were not delivered to the plaintiffs. To such a case the clause in question has no application. The defendants are to be presumed to know how many packages they received for delivery, and how many they delivered to plaintiffs, and it is not to be supposed that they stipulated for information as to a matter fully within their knowledge. As it regards the contents of a package, or the state of an article delivered, it is easy to understand the nature of the interest the defendants would have as to prompt information of any claim for damage or loss.

The disposition made by the court, as it regards this instruction, is not very clear, but that is not important, as the defendants were not entitled to have the instruction given.

The subject of the third instruction has already been considered as involving the false proposition that the receipt and memorandum of agreement was, without force in itself, considered as proof of the contract.

The fifth instruction was not called for. There was no contract between the parties based on the value of confederate currency. The court very properly refused to lay down any standard of the conversion of values, as the whole question was one of damage merely, a matter which is wholly within the province of the jury in a case of this nature.

None of the grounds of exception are sufficient to authorize this court to interfere with the judgment and verdict.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, J., concurred.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

SMITH V. CITY OF NEWBERN.

(70 N. C. 14.)

Municipal corporation — power to build market-houses.

A municipal corporation was authorized by its charter to "appoint market-places and regulate the same." *Held*, that it had power to build and repair a market-house.

ACTION on a certificate of indebtedness of the town of Newbern. The opinion states the case.

Seymour, for appellant.

Lehman, contra.

BYNUM, J. This is a civil action against the defendant, a municipal corporation, to recover the sum of \$930.58, due by audited account for building a market-house in and for the use of the city of Newbern. There was a verdict and judgment thereon for the plaintiff in the court below and an appeal to this court.

The case stated presents for our decision but one question, viz. Whether the city of Newbern had the power to build a market-house under the laws of the corporation.

Smith v. City of Newbern.

For the power, the plaintiff relies upon section 13 of chapter 25 of the acts of 1779, being an act for the regulation of the town of Newbern, and for other purposes, which, after enumerating other powers conferred upon the commissioners not material to our case, proceeds thus: "And shall have power, from time to time, and for all times hereafter, under their common seal, to make such rules, orders, regulations and ordinances as to them shall seem meet, for repairing the streets, erecting public wharves, *appointing market-places* and regulating the same, erecting public pumps and repairing the same, appointing town watches or patrols and making proper allowances for such services, and for all such other necessary ordinances, rules and orders which may tend to the advantage, improvement and good government of said town, and the same rules, regulations and ordinances, from time to time, to alter, change, amend or discontinue, as to the said commissioners, or a majority of them, shall appear necessary and best answer the purposes intended for regulating and governing said town."

It is a general and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in or incident to* the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation. Dillon on Mun. Corp., § 55; *Spaulding v. Lowell*, 23 Rich. 71, 74.

Our case seems to fall within the second class, for conceding that the power of "appointing a market-place and regulating the same" is not an express power to build, yet it is fairly implied, because a *market-house* is reasonably necessary and conducive to the enjoyment of the *market-place*.

"*Market*, a public place appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold." Bouv. Law Dic., tit. Market. "*Market* is taken for the place where kept." Lovel's Law Dic., tit. Market. A "market-place" does not necessarily or usually mean an uncovered space of ground dedicated as a market, but a market-house, just as we say "Monmouth place," meaning the building, or as we call a residence and its grounds "a fine place."

All corporations derive their powers from legislative grants, and can do no act for which authority is not expressly given or may not be reasonably inferred. But, if we say they can do noth-

ing for which a warrant could not be found in the language of their charter, we deny them, in many cases, the power of self-preservation, as well as many of the means necessary to effect the essential object of their creation — hence they may exercise all the powers within the fair intent and purpose of their creation which are reasonably necessary to give effect to powers expressly granted, and in doing this they must have the choice of means adopted to ends, and are not confined to any one mode of operation. *Bridgeport v. Railroad Co.*, 15 Conn. 475, 501. Here the power is granted in express terms “to make all such necessary ordinances, rules and orders as may tend to the advantage, improvement and good government of the town,” thereby vesting in the corporation the *discretion* as to the measure and mode of exercising the powers conferred. Under the powers before recited and as incident thereto, the city of Newbern unquestionably has power to provide suitable accommodations for the transaction of the business of the corporation — as to build a *town-house*. *French v. Quincy*, 3 Allen, 9; *People v. Harriess*, 4 Cal. 9. So as a sanitary regulation the city has power to procure a supply of water — as to bore an *artesian well*. *Livingston v. Pippen*, 31 Ala. 542; *Rome v. Cabot*, 28 Ga. 50. So to preserve the cleanliness and salubrity of the city, it may erect *public hospitals*. *Milne v. Davidson*, 5 La. 410. And for public health, convenience and comfort, it may regulate burials, as by establishing *cemeteries*. *City Council v. Baptist Church*, 4 Strobb. 306. It has power to abate and remove *livery-stables, slaughter-houses, gas-works, powder-houses, bawdy-houses* and the like, when, in the exercise of a fair discretion, they are deemed a nuisance to the town, as shown by innumerable cases.

It is not necessary that incorporated cities should have power by express grant to build a market-house. Thus it has been held that a town having authority to make by-laws for managing and ordering its “*prudential affairs*” has power to appropriate money for the erection of a market-house and raise the amount by taxation. *Caldwell v. Allen*, 33 Ill. 416; 23 Mich. 344; *Spaulding v. Lowell*, 23reck. 71. So power to “establish and regulate markets,” as a necessary incident, authorizes the purchase of ground whereon to erect the building. 14 N. Y. 356.

It may be that at the time of this grant, in the rude beginning of society in this country, the immediate erection of a *market-house* was not within the means of the corporation, or intended by the

State v. McPherson.

grant any more than the costly structures which now adorn American cities under similar grants; but as population, wealth and refinement advance, public decency, comfort and convenience require the exercise of those reserved powers of the charter "to make all such necessary ordinances, rules and orders as may tend to the advantage, improvement and good government of the town."

Judgment affirmed.

STATE V. MCPHERSON.

(70 N. C. 222.)

Burglary — breaking out — variance.

A defendant cannot be convicted of that with which he is not charged. *Therefore*, where the judge below, upon the trial of an indictment charging the defendant with breaking and entering into the house of the prosecutor and stealing therefrom, charged the jury "that, if they believed the defendants (however they may have got into the house) broke out of it, they were guilty:" *Held* to be error, and to entitle the defendants to a new trial.

INDICTMENT for burglary. The facts are stated in the opinion. Defendants were convicted, and appealed to this court.

Purnell and *J. C. L. Harris*, for defendants.

Attorney-General Hargrove, for State.

READER, J. Burglary, at common law, was the breaking and entering a dwelling-house, in the night-time, with intent to commit a felony. It was necessary to charge in the indictment, *fregit et intravit*—"broke and entered." And so are all the precedents. And so is the indictment before us. And there was evidence tending to show that the prisoners did break and enter; and they were convicted by the jury. And yet they cannot be punished, because of error committed on the trial. It was not left to the jury to say whether the prisoners did break and enter the house, but whether they broke out of the house. The solicitor asked

his honor to charge, and his honor did charge the jury, "that, if they believed that the defendants (however they may have got into the house) broke out of it, they were guilty." Now, as there was no charge that they broke out of the house, and as they could not be convicted of that with which they were not charged, it follows that their conviction was wrong. Grant that it is just as much a crime to break out of a house as it is to break into it, just as it is as much a crime to kill a man with poison as with a sword; yet you cannot charge him with one crime and convict him of another; nor can you charge him with committing a crime in a certain manner, and convict him of doing it in a different manner.

At common law it was at least doubtful whether one could be convicted of burglary, even when charged with breaking out of a house. The better opinion seemed to be, that the breaking must be for the purpose of effecting an *entrance*, and not for the purpose of effecting an *escape*. And therefore the statute of 12 Anne was passed, which made it burglary to break out of a house, the same as to break into it. The statute, after reciting "that there had been some doubts whether the entering the mansion-house without breaking the same, with an intent to commit some felony, and breaking said house in the night-time, to get out, were burglary;" declared that "if any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, and shall in the night-time break the said house to get out of the same, such person shall be guilty of burglary, as if he had broken into the house," etc. That statute was subsequently repealed, and 8 Geo. IV was passed, which provides that, "if any person shall enter the dwelling-house of another with intent to commit felony, or being in such house, shall commit any felony, and shall in either case break out of the said house in the night-time, such person shall be deemed guilty of burglary."

It is clear that in order to convict, under this statute, it is necessary to charge that he did "break out," and not that he broke in. Such was the practice and such were the precedents, and the decisions, which may be found collected in *Leading Criminal Cases*, vol. 2, p. 63. And the practice under the statutes was very strict. In one case the charge was, "*did break to get out*;" and in another, "*did break and get out*. Held not to be sufficient; for the words

State v. Collins.

of the statute were "break out." And so the defendant was convicted of larceny only, and acquitted of burglary. In the case before us, breaking out is not charged in the indictment in any form, but only breaking in; and yet the jury were told that they might convict of breaking out. If the prisoners had been charged in the indictment with breaking out, there was evidence upon which they might have been convicted; but there was no such charge; and, therefore, the conviction was erroneous.

Our statute (Bat. Rev., ch. 32, § 12) is substantially the same as the English statute.

There is error.

This will be certified.

Venire de novo.

STATE V. COLLINS.

(70 N. C. 241.)

Criminal law — trial — evidence on trial of joint defendants — challenge of jurors — limiting time for argument.

In criminal trials against two or more defendants, the judge has the right in his discretion to separate the evidence bearing upon the case of each, and to instruct the jury, as to what is competent against one, and incompetent against another.

It is no good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case according to the law and evidence, uninfluenced by any opinion he may have so formed from such rumor.

When several persons are jointly indicted, they cannot claim separate trials as a matter of right. Such separation is a matter of discretion with the court. In trials for capital felonies, the presiding judge has the right to regulate, by reasonable rules and limitations, the arguments in the cause: *Hence*, it is no good ground for a new trial, that the counsel of the prisoner was limited by the court, in his remarks, to one hour and a half. (*See note, p. 775.*)

INDICTMENT of David Collins, Alex. Blalock and Jacob Hood, for the murder of one Allen Jones.

Upon the trial, the prisoners excepted to the rulings of his honor, which exceptions were noted, and are fully set out in the opinion of

the court, and in the dissenting opinion of Justice BYNUM, as are also the facts touching the points decided.

Collins and Blalock were convicted; Hood acquitted. Motion for a new trial; motion overruled. Judgment and appeal.

Fuller & Ashe, Smith & Strong, and Spears, for prisoners.

Attorney-General Hargrove, for State.

SETTLE, J. The prisoners, together with one Hood, were tried at Fall term, 1873, of the Superior Court for Johnston county, on an indictment charging them with the murder of one Allen Jones.

The jury returned a verdict acquitting Hood and convicting the prisoners. Several points made upon the record were abandoned upon the argument in this court.

We will now consider all exceptions which require comment :

It would seem that the prisoner, Collins, joined the State in the prosecution of Hood, and introduced evidence against Hood, which also implicated Blalock. To this Blalock excepted.

His honor allowed the jury to consider the evidence as against Hood, but told them it was not evidence against Blalock. There is nothing unusual in this practice. It frequently happens in joint trials that the judge has to separate the evidence bearing upon the case of each prisoner, and instruct the jury as to what is competent against one and incompetent against another.

The prisoner Collins excepts,

1. Because a juror was not rejected by the court who stated that he "had formed or expressed" the opinion that the prisoner, Collins, was guilty, but who, on being asked the foundation for his opinion, replied that it was founded upon rumor, and not upon any evidence; and in answer to a further question, he stated that he could try the case by the law and the evidence, and would not be influenced by any opinion he may have formed from rumor.

We understand from this, that when the juror was tendered he was challenged by the prisoner, Collins, for cause, and the cause assigned was that he had formed and expressed an opinion adverse to the prisoner, Collins, and therefore his honor (in the stead of triers), after an examination of the juror, found him to be indifferent. The court seems to have followed the practice adopted in the case of *State v. Ellington*, 7 Ired. 61, and the answers of the juror here are almost identical with those of a juror in that case.

The principles established in the case of *The State v. Ellington*, *supra*, following the case of *The State v. Benton*, 2 Dev. & Bat. 196, is, that an opinion fully made up and expressed is a good cause of principal challenge as a matter of law; but that one imperfectly formed, or one merely hypothetical, that is, formed on the supposition that the facts are as they have been represented, does not constitute cause of such a challenge, but of challenge to the favor, which is to be allowed or disallowed as the triers shall find the fact of favor or indifference; and that when the judge becomes satisfied that what the juror calls an opinion, was not such in legal meaning, and that it had left no unfavorable bias on his mind, the challenge should be overruled.

To the very satisfactory reasons given in Ellington's case for this practice, we will add, that in these days of newspapers, railroads and telegraphic communication, it is exceedingly difficult to find persons of sufficient intelligence to sit on a jury, who have not heard something of almost every capital crime which occurs in the State. And if we disqualify all who have received some impression from such information or rumors, and have casually expressed an opinion as to the guilt or innocence of the accused, we will exclude from the jury box the best educated, and the most liberal-minded portion of the community. The better informed a juror is, the more apt will he be to guard against improper influences.

2d. The prisoner, Collins, moved for a separate trial, stating that as he was a white man, and the other prisoners were colored, a severance was necessary to a fair trial. This motion was overruled, and Collins excepted.

Where several persons are jointly indicted, they cannot claim separate trials as a matter of right.

Mr. Justice STORY says, in *United States v. Marchant and Colson*, "this is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence."

The same doctrine is laid down by the text-writers, and is quoted with approbation in this State. *State v. Smith*, 2 Ired. 402.

3d exception: "That in the argument of the case the constitutional rights of the prisoner, as declared in art. 1, sec. 11 of the constitution of North Carolina, were infringed, and in a great measure virtually denied him, inasmuch as only one hour and a half was allowed to him for the argument of his case, he asking for

more time when the allotment of time was made by the presiding judge; a large number of witnesses having been examined on both sides." In this country every one has a constitutional right in all criminal prosecutions to have counsel for his defense; and if he be too poor to employ counsel, it is the duty of the court to assign some one to defend him; and it is the duty of the counsel thus assigned to give to the accused the benefit of his best exertions. It is gratifying to be able to state that the bench and the bar in North Carolina have always dealt mercifully and generously with those who have had the double misfortune to be stricken with poverty and accused of crime.

This, we believe, is the first complaint that has reached the ears of this court that any one accused of crime has been denied the full benefit of counsel for his defense. For although this right has sometimes been abused, yet the judges, in the exercise of their discretion, have deemed it better to submit to an abuse rather than to have even the appearance of denying a right. We regret that complaint is now heard. And while we feel constrained by the weight of authority and reason to hold that a judge must have the superintending control of his court, with power to direct the proceedings of the same, so that the time shall not be wasted in arguments, disputes and contentions, having no tendency to bring about a fair and legal disposition of judicial business, yet we do not recommend the ruling of his honor in the case before us as a precedent worthy of general imitation.

In *Wood's case*, 7 Leigh, 743, the court refused to allow counsel to address either the jury or the court. Upon appeal this was held to be error; but the court say, "while we thus decide, we are not to be understood as restricting, in any degree, the power of the court to prevent an abuse of this or any other right by exercising a proper control over the course of the argument."

In *Commonwealth v. Porter*, 10 Metc. 263, the court say, "it is within the legitimate power, and it is the duty of the court to superintend the course of the trial; to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, cases or works of supposed authority which may be offered on either side; to decide upon all collateral and incidental proceedings, and to confine parties and counsel to the matters within the issue."

In *Lynch v. The State*, 9 Ind. 541, it is said, "the court has a

State v. Collins.

right to regulate by reasonable rules and limitations the argument of counsel. This is a necessary discretion to be possessed by the court to prevent abuse."

The only case we have been able to find, which would seem to be in conflict with these authorities, is *The People v. Keenan*, 13 Cal. 581, where the counsel for the prisoner was limited, in his argument, as in our case, to one hour and a half.

The Supreme Court, acting upon "the affidavits of counsel of respectability and standing, which shows that they were prevented, by this restriction, from a full and fair defense of their client," granted a new trial, yet, in doing so, the court say, "an enlarged discretion must necessarily be given to a judge over this subject, and we should certainly with great reluctance disturb the exercise of that discretion in any given case. Nor do we here question the right of a district judge to limit the counsel to a reasonable time in their arguments to the jury, though, from the danger to which this power is exposed, it is perhaps better, if ever done at all in capital cases, that it should only be done in very extraordinary and peculiar instances."

It seems to us that the admission of a discretion in a judge to limit the counsel is at the same time a denial of the right to review the exercise of that discretion.

While judges, like other men, are liable to make mistakes, yet it is apprehended that the substantial ends of justice will be better served by giving to them the general supervision of the courts, than by depriving them of powers necessary for the protection of the courts, and the dispatch of business. It is to be presumed that the judge who sees and hears all the incidents of a trial is better qualified to exercise a discretion, as to its conduct, than the justices of the Supreme Court, who have only the limited view afforded by the record. Upon consideration of the whole case we are of opinion that there is no error.

BYNUM, J., dissenting.

Judgment affirmed.

NOTE.—Mr. Justice BYNUM's dissent was to the point that the court could place a limitation upon the time of the arguments. In *Hunt v. State*, 15 Am. Rep. 677, the Supreme Court of Georgia held that a judge, presiding at a criminal trial, could not limit the arguments of counsel—the time given in that case was forty minutes. See Cooley's Const. Lim. p. 336. In *People v. Keenan*, 13 Cal. 581, a verdict in a capital case was set aside, because the court limited the time

Boykin v. Boykin.

for the arguments against the prisoner's consent; but the court did not question the right of the trial judge "to limit the counsel to a reasonable time in their arguments to the jury." It held, however, that the limitation must not deprive the defendant of an opportunity for a full and fair defense. BYNUM, J., in his dissenting opinion to the principal case, mentions *State v. Spier*, 1 Dev. 491, as a case wherein "an eminent counsel in this State confessedly spoke against time to save the life of the accused by the expiration of the term of the court." *Rm.*

BOYKIN V. BOYKIN.

(70 N. C. 282.)

Evidence — husband and wife — evidence of access.

At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by a statute allowing parties to testify in their own behalf.

ACTION, in the nature of a petition for partition of lands, filed in the Probate Court by John S. Boykin and Algatha, his wife, against Harris Boykin and Polly, his wife.

The case comes to this court upon the appeal of the plaintiff, who excepted to the rejection by the court of certain evidence by them offered, tending to establish the legitimacy of the *feme* plaintiff, the issue then joined.

The facts relating to the point decided are fully set out in the opinion of the court.

Faircloth & Granger, for appellants.*Smith & Strong*, contra.

BYNUM, J. In 1870, one Nelson Kent died intestate, seized of the land in dispute, and without issue, but leaving brothers and sisters, his only heirs at law.

Algatha, the female plaintiff, claims that she is a sister of the intestate and one of his heirs at law. It was admitted that the intestate and the defendants were the legitimate issue of Wiley

Boykin v. Boykin.

Kent and Milly Kent, and also, that plaintiff, Algatha, was the daughter of said Milly, and born in wedlock, and as to her the following issue was made up by consent and submitted to the jury, to wit: "Was Algatha Boykin, the female plaintiff, the legitimate child of Wiley Kent and Milly Kent?"

The defendants introduced evidence tending to show non-access of said Wiley and Milly during the period of gestation, immediately preceding the birth of Algatha.

The plaintiff then offered the deposition of Milly Kent, the mother, since deceased, for the purpose of establishing the paternity of her several children. His honor allowed certain portions of the deposition to be read, but rejected that part wherein she testified that her husband, Wiley Kent, was the father of Algatha, the plaintiff. The plaintiff excepted. There was a verdict for the defendant, and the plaintiff appealed.

In 2 Greenl. 132, it is laid down that the fact of access may be proved by the husband and wife, but the adjudged cases he refers to, as establishing that proposition, fall short of sustaining him, and no other elementary writer supports such a principle of evidence.

In the case of *The King v. Lourtou*, 31 Eng. C. L. R. 312, all the cases affecting the admissibility of this kind of evidence are reviewed, and the true principle clearly enunciated by all the judges. Lord DENMAN: "It is desirable to show, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule cited in 2 Stark. Ev. 139, note *x*, from *Goodright v. Moss*, 2 Camp. 591, supported by *Rex v. Rea*, 11 East, 132, is that parties shall not be permitted, after marriage, to say that they had no connection. Then, it being clear and indisputable, that, for the purpose of proving non-access, neither husband nor wife can be a witness," etc. LITTLEDALE, J., in the same case, "But I think it (the rule) extends further and excludes all questions which have a *tendency* to prove *access* or *non-access*. Suppose in a dispute respecting legitimacy, it were an issue directed by the Court of Chancery, whether the husband and wife had or had not access to each other at such a time, I should say that neither of them could answer any question having a tendency to prove the negative or affirmative of that single issue." So PATTERSON, J.: "It is trifling to say that all inquiries may be made of a witness,

close up to the point of access or non-access, so that, by the variation of terms, the direct question on that subject be avoided.

Whether the investigation arise upon an issue out of Chancery, or whether it be raised, as it was in the present case, the question as to access or non-access is not to be asked at all, in examining the husband or wife," and to the same effect was WILLIAMS, J.

It is then conclusively settled that at common law neither the husband or wife could prove access or non-access, and it is equally well settled that where they were not allowed to make such proof during marriage, neither will be allowed to do so after the death of the other, thus removing one great cause of distrust, by making the confidence which once subsists, ever afterward inviolable in courts of law. 1 Phil. Ev. 70-80. There are exceptions to this rule, founded on *necessity*, where to exclude such evidence would occasion insecurity to that very relation of society, which it was the object of the rule to protect. In all such cases of necessity, as, for instance, personal violence, rape, bastardy and articles of the peace, the authorities for admitting the wife's testimony in favor of the husband are equally authorities for receiving it when against him, and the rule is limited to the necessity. When a child is born in wedlock, it is presumed in law to be legitimate, and at one time this presumption could not be rebutted, if the husband was *intra quartuor maria* during the period of gestation, but this doctrine was exploded in the case of *Pendril v. Pendril*, 2 Str. 925, and gave way to the modern doctrine, that this presumption of legitimacy may be rebutted by any competent evidence tending to show and satisfy the jury that such intercourse did not take place at any time when by the laws of nature the husband could have been father of the child. 2 Greenl. Ev. 130, 131.

In practice it can seldom happen that there can be any thing gained by introducing the wife to prove access, for since the law presumes legitimacy on proof of birth in wedlock, the whole burden of proving non-access is thrown upon the party who affirms this negative proposition, so difficult of proof. If it should sometimes happen that evidence of access by the wife would promote the ends of justice, the law says it is better to suffer the occasional hardship than by lifting the veil from the domestic sanctuary, to expose to public view the secrets and scandals of private life.

Such being the rule at common law, it remains to be seen whether

Boykin v. Roykin.

the recent changes in the law of evidence, in our State, affects this case.

When the statute allowed parties to testify in their own behalf, there was no longer any reason for excluding husband and wife on account of *interest*, and that barrier was swept away by ch. 43, § 15, Bat. Rev., and C. C. P., § 340. But the reason why the wife was not allowed to prove access or non-access is by Lord MANSFIELD and all other authorities declared to be "founded in decency, morality and public policy." *Goodbright v. Moses*, 2 Comp. 925; *State v. Patteway*, 3 Hawks, 363; 2 Str. 1076; 8 East, 196.

It cannot for a moment be supposed that the laws of "decency and morality" are less binding upon us than upon our more enlightened ancestors. Therefore, as might be expected, our recent legislation upon this subject (C. C. P., § 340) contains a saving clause, which preserves the ancient rule of evidence intact. "Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding, in consequence of adultery or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compelled to disclose any confidential communication made by the one to the other during marriage."

In our opinion, this proviso, in both spirit and letter, maintains the common-law rule and excludes the evidence which his honor rejected.

It is admitted on all sides that the wife cannot bastardize her issue born in wedlock by proving non-access, but it is contended that she may establish their legitimacy by proving access. Apart from the authorities before recited directly opposed to this position, a slight examination of the principles of evidence will expose its fallacy. For if the wife can give evidence of access, she can, by cross-examination, be made to prove non-access, as it is a universal principle, without a single exception, that where a witness is introduced to prove a fact in issue, she may be cross-examined as to that fact, so as to disprove it and establish directly the reverse. If, therefore, the wife becomes a witness to prove access, she at the same moment became a witness to prove non-access, thus exposing the absurdity of the proposition that she may be examined to prove access, but cannot be examined to prove non-access.

Haskins v. Royster.

Such is the view taken in the cases cited above, and such is one of the reasons given why she is wholly excluded as an incompetent witness to that fact, although competent to prove any other distinct, substantive part. Bishop on Marriage and Divorce, § 447.

There is no error.

Judgment affirmed.

HASKINS, appellant, v. ROYSTER.

(78 N. C. 601.)

Master and servant — action by master against third person for enticing away servant.

Plaintiff employed laborers to work on his farm, under written contracts whereby they were to receive part of the crops for their services. *Held*, (1) that he could maintain an action against defendant for inducing them to break their contracts; (2) that it was no defense that the contracts were unreasonable.

ACTION to recover damages for enticing away laborers. In his complaint, the plaintiff alleges that he had employed certain laborers, naming them, to work on his farm during the year 1871, under written contracts; and that while they were at work according to the terms of said contract, the defendant, in March of that year, unlawfully enticed and persuaded said laborers to leave his, the plaintiff's, employment, and unlawfully harbored and detained them for the space of ten months. For this, plaintiff demands damages, etc.

The case states that, after hearing the evidence on both sides and before the case was left to the jury, his honor decided that the plaintiff was not entitled to recover upon his complaint filed. To which ruling plaintiff excepted, submitted to a nonsuit, and appealed.

W. A. Graham (with whom was J. W. Graham and McCorkle & Bailey), for appellant.

RODMAN, J. We take it to be a settled principle of law, that if one contracts upon a consideration to render personal services for

Haskins v. Royster.

another, any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should not find it in the laws of the freest and most enlightened States in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons.

We are relieved from any labor in finding authorities for this principle, by a very recent decision of the Supreme Court of Massachusetts, in which a learned and able judge delivers the opinion of the court. *Walker v. Cronin*, 107 Mass. 555.

That case was this: The plaintiffs declared in substance that they were shoemakers, and employed a large number of persons as bottomers of boots and shoes, and defendant, unlawfully, and intending to injure the plaintiff in his business, persuaded and induced the persons so employed to abandon the employment of the plaintiff, whereby plaintiff was damaged, etc.

A second count says that plaintiff had employed certain persons named to make up stock into boots and shoes, and defendant, well knowing, etc., induced said persons to refuse to make and finish such boots and shoes, etc.

The third count is not material to be noticed.

The defendant demurred. The court held each of the counts good.

I shall make no apology for quoting copiously from this opinion, because the high respectability of the court, and the learning and care with which the question is discussed, make the decision eminently an authority.

“This (the declaration) sets forth sufficiently (1) intentional and willful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting.”

The general principle is announced in Com. Dig., Action on

the Case, A. "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." "The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong." See *Carew v. Rutherford*, 106 Mass. 1, 10, 11.

"Thus every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated, may be held liable for the wrong, although he did it for the purpose of promoting his own business.

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

"It is a familiar and well-established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description.

In *Hart v. Aldridge*, Cowp. 54, it was applied to a case very much like the present.

Haskins v. Royster.

In *Gunter v. Astor*, 4 J. B. Moore, 12, it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer.

In *Shepperd v. Wakeman*, Sid. 79, it was applied to the loss of a contract of marriage, by reason of a false and malicious letter claiming a previous engagement.

In *Winsmore v. Greenbank*, Willes, 577, the defendant was held liable in damages for unlawfully and unjustly "procuring, enticing, and persuading" the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife, and the profit and advantage of her fortune. *Barbee v. Armistead*, 10 Ired. 530.

In *Lumly v. Gye*, 2 El. & Bl. 216 (20 Eng. L. & E. R. 168), the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory, and she had never actually entered into the service of the plaintiff; and COLBRIDGE, J., dissented, insisting that the only foundation for such an action was the statute of laborers, which did not apply to a service of that character; but, after full discussion and deliberation, it was held that the action would lie for the damage thus caused by the defendant."

To the same effect are *Jones v. Jeter*, 43 Ga. 331, and *Salter v. Howard*, id. 601, in both which cases the servants enticed were employees in husbandry. The only case to the contrary that we are aware of is *Burgess v. Carpenter*, 2 Rich. (S. C.) 7; but the authorities relied on in that case seem to us not in point. And although this action is not brought under our act of 1866 (Bat. Rev., ch. 70), yet that act is evidence of the common law.

It is suggested (for we did not have the benefit of an argument for the defendant), that in the present case the contract between the plaintiff and Eastwood and Wilkerson is unreasonable and therefore void. We cannot suppose it to be contended that this court, or any court, when there is no suggestion of fraud, can inquire whether the reward agreed to be paid to a workman is the highest that he might have got in the market, and to declare the contract void, or to make a new one if it thought not to be the highest. No court can make itself the guardian of persons *sui juris*. That would be an assumption inconsistent with their freedom. We suppose the objection to point to that part of the con-

Haskins v. Royster.

tract which is, in substance, that if either party of the second part, or any person for whom they contract, shall misbehave *in the opinion of the party of the first part*, such misbehaving party shall quit the premises *and forfeit to the party of the first part* all his interest in the common crop.

It is said that these provisions make the plaintiff a judge in his own cause, which the law will not allow, and that they are manifestly so oppressive and fraudulent as to avoid the whole contract. This proposition will be found on examination to go much too far, even as between one of the parties to the contract, and to have no application as between one of the parties and a malicious intermeddler, as the defendant must, in this stage of the case, be considered.

It is not necessary to decide what would be the effect of such a stipulation in an action on the contract between the parties to it. But as there seems to be some misconception of the law of such a case, and as, although there are numerous authorities on the question, it is not yet of "familiar learning" in our courts, a few observations will more conveniently lead us to the question actually presented.

The authorities are conclusive that the parties to a contract, if there be no fraud or concealment of the interest, may agree to make a person interested, or even one of the parties an arbitrator to decide all controversies which may arise under the contract, and such agreement will be valid and effectual.

In Watson on Arbitration, 85, it is said: "It seems that it is no objection to an award that the arbitrator was a party, or interested in the matter submitted, provided that the party objecting, at the time of the submission, knew that the arbitrator was so interested; as in the case when Sergeant Hards took a horse from my Lord of Canterbury's bailiff for a deodand, and thereupon the archbishop brought his action, and by a rule of court it was referred to the archbishop to set the price upon the horse; the sergeant afterward sought to set aside the award, on the ground of the interest of the archbishop: but it was denied by Lord HALE, and *per totam curiam*. Comb. 218; S. C. 4; Mod. 226; Hard. 43; 1 Inc. & W. 511. See also Russell on Arbitration, 108. In Morse on Arbitration, it is said that a person interested or partial is incompetent to act as an arbitrator (p. 100). But the parties may, if they choose, waive the objection. "They are at liberty to select

Haskins v. Royster.

a person interested or a person prejudiced, a relation, or an enemy of either of them. *Strong v. Strong*, 9 Cush. 560; *Fox v. Hamilton*, 10 Pick. 275. See also *Morse*, 108. The most important case on this question, however, is *Ranger v. Great Western R. W. Co.*, 5 H. L. 72. There it was agreed between the plaintiff, who contracted to build the road, and the company, that Brunel, who was the engineer of the company, and a large shareholder in it, should be the judge of the amount and value of the work done. The Lord Chancellor, after saying that Brunel was the mere agent of the company, and in effect the company itself, continues: "It does not appear to me to be necessary to institute any minute inquiry as to how far the calculations of Mr. Brunel were accurate. *I think it quite enough if they were bona fide*, and with the intention of acting according to the exigency of the terms of the contract. The company expressly stipulated that, during the progress of the work, the decision of the engineer, as to the value of the work, should be final. If the appellant thought this a harsh or oppressive clause, he ought not to have agreed to it. It does not, however, seem to have been unreasonable." To the same effect are *Elliot v. Southdown R. W. Co.*, 2 De Gex & Sm. 17; *Hawley v. N. S. R., W. C.*, id. 33; *Kimberley v. Dick*, 13 Eq. Cases, 1.

The case of *Ranger v. Great Western Railway Company* also holds that penalties and forfeitures upon a contractor, provided for in case the work be not properly done, or done in due time, are reasonable, and will be enforced, even to the great loss of the careless or dilatory contractor.

These authorities unquestionably establish that such stipulations are not void or voidable even as between the parties, and it has never been supposed or contended that they made the whole contract void; as, even if void themselves, they are clearly separable from the other parts. Either party, therefore, could maintain an action on this contract.

It is important, however, to notice that none of these authorities goes to the length of holding, that if, after the contractors had duly performed all or a part of the work, the plaintiff had *mala fide*, or without lawful cause, discharged them, they could not recover upon the contract. The contrary is implied in the language of the Lord Chancellor in *Ranger v. Great Western Railway Co.*, and is evidently most consistent with reason and justice. The power is

tempted to be reserved cannot have any greater effect than to make the discharge *prima facie* lawful, if so much as that.

Contracts, with such stipulations as we find in the present, are not to be commended as precedents. Such stipulations are unusual; they answer no useful purpose, and suggest an intent (perhaps in this case untrue) to take some improper advantage, and to exact from the employees a decree of personal deference and respect, beyond that civil and courteous deportment which every man owes to his fellow in every relation in life. To this extent, a mutual duty is implied in every contract which creates the relation of master and servant. If the servant fails in due respect, the master may discharge him, and so, if the master fails, the servant will be justified in quitting the employment.

Again, it is suggested that the contractors of the second part in this contract are *croppers*, and not servants. By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop. But such a person is not a tenant, for he has no estate in the land, nor in the crop, until the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money.

It is unnecessary to discuss the question whether one who maliciously persuaded a *tenant* to abandon his holding would not be liable in damages for such officious intermeddling.

But whatever may be the effect of the provisions commented on, as between the parties to the contract, the authorities are clear and decisive that a person in the situation of the defendant can take no advantage from them. As the case now stands, he cannot pretend to play the part of a chivalrous protector of defrauded ignorance. For the present at least, he must be regarded as a malicious intermeddler, using the word "malicious" in its legal sense.

There is a certain analogy among all the domestic relations, and it would be dangerous to the repose and happiness of families if the law permitted any man, under whatever professions of philanthropy or charity, to sow discontent between the head of a family and its various members, wife, children and servants. Interference with such relations can only be justified under the most special circumstances, and where there cannot be the slightest suspicion of a spirit of mischief-making, or self-interest.

To enable a plaintiff to recover from one who entices his servant, it is sufficient to show a *subsisting relation of service*, even if it be

Norfleet v. Cromwell.

determinable at will. In *Keane v. Boycott*, 2 H. Bl. 511, the plaintiff sued a recruiting officer for enticing his servant. The servant was an infant and had been a slave in St. Vincents, where he indentured himself to serve the plaintiff for five years. The indenture, of course, was void upon a double ground, but the court held the plaintiff entitled to recover. EYRE, C. J., says: "The defendant in this case *had no concern in the relation between the plaintiff and his servant*; he dissolved it officiously, and to speak of his conduct in the mildest terms, he carried too far his zeal for the recruiting service." In *Sykes v. Dixon*, 9 Ad. & El. 693, that case is distinguished from *Keane v. Boycott*, upon the ground that the servant had quitted his master before the defendant employed him, and there was then no subsisting relation of service. In *Evans v. Walton*, 2 O. P. 615 (E. L. R.), it was held not necessary to show a valid and binding contract for service, but only the existence of the relation. If the servant was one at will, the action could be sustained. *Salter v. Howard*, 53 Ga., is to the same effect.

We are of opinion that the complaint sets forth a sufficient cause of action.

The judgment is reversed and the case remanded to be proceeded in, etc. Let this opinion be certified.

Judgment reversed.

READER, J., dissented.

NORFLEET V. CROMWELL, appellant.

(70 N. C. 684.)

Constitutional law — draining acts. Covenants, against whom enforced.

The right of the State to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroads, school-houses, etc. The acts granting such powers are not unconstitutional.

Where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced against an assignee of the covenantor with notice. If the party, from whom an assignee purchases, cannot complain of an alleged misuser of an easement, the assignee cannot, as he stands in the shoes of him from whom he purchased.

ACTION upon a covenant of defendant's assignor. All the facts pertinent to the points decided are set out in the opinion of the court.

The jury, upon the issues submitted to them by the presiding judge, found a verdict for the plaintiffs. Judgment in accordance therewith, and appeal by defendant.

J. L. Bridgers, Jr., for appellant.

No counsel *contra* in this court.

RODMAN, J. These are the facts material for the present purpose as gathered from the pleadings and verdict.

In January, 1855, Eaton Cobb and the plaintiff Harrell were in the possession and use of a canal lying partly on their own lands and partly on the lands of others, of whom the defendant was one. It passed near to, but did not touch, two pieces of land then belonging to one Gregory, which, upon his death, descended to Lloyd, after whose death the defendant purchased them from his devisees.

In 1855, the defendant owned certain lands, which he still owns, which lie below the lands of the plaintiffs, and at or near the mouth of the canal. The lands which he purchased from the devisees of Lloyd also lie below those of plaintiffs, and are separated from the canal by intervening strips of land, which, in 1855, belonged to the defendant, and still do. One of these strips is thirty feet and the other three hundred and fifty yards wide.

On January 25, 1855, Cobb and Harrell entered into a covenant with a number of other persons, by which these were allowed to drain into the canal several pieces of land, not mentioned in the proceedings in the county court of Edgecombe (presently to be mentioned more fully), under which Cobb and Harrell acquired their right to the canal. This covenant provided that each party might determine what work was necessary at any time to be done on the canal, and he was empowered to do it, and the other parties were to pay their several shares of the expense, in proportions which were fixed. It also provided on what terms other persons might be afterward let in to the use of the canal, for drainage. It expressly stipulated that it should be binding, not only on the parties themselves, but also on their heirs and assigns, *quoad* the lands specified in it. The defendant was no party to it.

On the 29th of July, 1858, the parties to the covenant of 1855 entered into a covenant with Lloyd, by which it was agreed that he, his heirs and assigns, might drain his lands into the canal,

Norfleet v. Cromwell.

provided it should not be entered at more than one point by any ditch from one of the pieces of land. It provided that "all the rights and privileges, and all the burdens and duties conferred and imposed by the articles of agreement of January 20, 1855, shall be enjoyed and borne by the parties to the agreement of July 20, 1858," with certain alterations not material to the present purpose; it also provided the proportion of work to be done on the canal by Lloyd, his heirs and assigns.

On the 10th of December, 1860, the devisees of Lloyd conveyed his lands, referred to in the covenant, to the defendant, to hold to him, and his heirs and assigns, with all the privileges, easements, appurtenances, rights, advantages, burdens, and incumbrances thereunto belonging and appertaining, etc.

After this deed was made, the intestate of plaintiff, Norfleet, did some work on the canal, and after a refusal by defendant to pay Lloyd's share according to the covenant of 1858, this action was brought to recover it.

The defendant professes not to dispute any of the doctrines upon which the decision of this court went, in a former case between the same parties, arising out of the same matters, reported in 64 N. C. 1. He now puts his defense on matters not then appearing on the record, and it will be convenient to consider them successively.

1. He denies that Cobb and Harrell owned a canal in 1855. He admits that there was a canal situated as described, and through which the water from their lands actually flowed through his lands; but he denies that they had any rightful title to the easement.

We think it unnecessary to consider what effect the actual enjoyment of the easement without a title would have on the present case, for we think that Cobb and Harrell did have a title.

At February term, 1847, of Edgecombe county court, they filed their petition against the present defendant and others, under the act of 1795 (Rev. Stat., chap. 40), setting forth in brief, that they severally owned lands which could not be drained except through the lands of defendants, and praying for a jury to lay off a canal, etc. It was ordered accordingly.

At May term, 1847, the jury returned that a canal, as prayed for, was necessary; prescribed its route minutely, and assessed damages to the owners of the lands through which it would pass. The report was confirmed, the damages were paid into court, and the canal was cut.

As the law then stood, the petitioners acquired not merely an easement, but a title in fee to the lands condemned by the jury. No irregularity in the proceedings has been pointed out, and if any existed, the defendant could not collaterally impeach the decree on that account.

The defendant takes higher ground, and contends that the act of 1795 was unconstitutional, because it took his property *for a mere private purpose*. It is admitted that that cannot be lawfully done, and the only question on this point is as to the character of the purpose; whether it was to the benefit of one, or of a limited number of individuals only, or of such general and public utility, as justifies a State in the exercise of its power of eminent domain.

It is well known that in the Atlantic section of this State there are hundreds of thousands of acres of what are called swamp lands, which, from the flatness of their surface and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the State on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. In an agricultural view it now benefits the whole population of that part of the State in which these swamps are found. The right of the State to condemn lands for drains rests on the same foundation as its right in cases of public roads, mills, railroads, cartways, school-houses, forts, light-houses, etc. In the case of public roads, it has never been doubted, and the weight of authority is decidedly in favor of its existence for the other purposes mentioned. Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them. The right to drain through the banks of a natural water-course is exactly similar in character to the right to construct dykes or levees to

keep their excessive waters from overflowing the adjacent lands, a right which has been recognized in the legislation of all countries from the most ancient times. Witness the dykes which protect the coast of Holland, the fens of Lincolnshire, the lands on the Mississippi and on the Po. Both purposes are classed together in our act of 1789.

The act in question, and others of a like character respecting mills, etc., are of ancient date. They have been incidentally sanctioned by this court in many decisions, and if their constitutionality has never been directly affirmed, it may be because it was never questioned. These acts are not peculiar to North Carolina. Acts concerning mills, similar to ours, exist in many of the States (Washburn on Easements, 394 [329], and respecting drainage at least in Massachusetts [Gen. Stat., ch. 148], and New York [2 R. S. 548]; *People v. Nearing*, 27 N. Y. [13 Smith] 306.) The constitutionality of the Mill Acts has been sometimes questioned. Washburn on Easements, 414; *Tyler v. Beacher*, 44 Vt. 648; S. C., 8 Am. Rep. 398. This last case cites the principal authorities, and quotes from COOLEY, J., in a Michigan case, to the effect that, when the State reserves a control over the parties to whom the easement is given, the power of eminent domain may be lawfully used in their behalf. In the law we are discussing, the State reserves such a control.

The canal is the private property of the petitioners, but all may acquire a right to drain into it on just terms, and their reciprocal duties may be regulated from time to time by the courts. We conclude that both upon reason and authority the natural water-courses of a country are *publici juris* for all purposes of general utility, whether of navigation, for public landings, tow-paths, levees, or the outlet of canals.

II. The defendant contends that the covenant of Lloyd does not run with the land. His counsel endeavored to distinguish the present case from that in 64 N. O. 1, by reason that it appeared, or was assumed there, that the canal was, in part, situated on the Lloyd lands, when it appears now that it does not touch either piece, although it is near enough to them to affect them somewhat.

The language of Lord COKE in *Spencer's case*, 1 Smith's L. O. 23, does not require a physical touch. "But although the covenant be for him or his assigns, yet if the thing to be done be *merely col-*

lateral to the land, and do not *touch or concern* the thing demised in any sort, there the assignee shall not be charged." In this case the thing to be done is to pay for work done on a canal which does not touch the land of the covenantor, but is to his benefit, and the way in which it was contemplated to obtain that benefit more fully and directly, was by connecting the land with the canal by a ditch, which must, of course, touch the land; and its not being *in esse* at the time makes no difference when assigns are mentioned. Looking at the whole agreement, of which the covenant was a part, it is clear that it did directly *concern* the land.

Many cases have held that where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced in equity against an assignee of the covenantor, with notice, as the defendant here is. *Tulk v. Mozhay*, 2 Phil. 776 (22 Cond. E. Ch.); 11 Bew. 571; *Western v. McDermot*, 1 Eq. 449; 2 Ch. App. 72; *Barrow v. Richard*, 8 Paige, 351; *St. Andrew's Church appeal*, 67 Penn. 512.

Independently of this, however, there are two arguments which might be out of place in a mere court of law, but which a court of equity is entitled to notice, that must be considered conclusive of the question:

1. The consideration for the covenant was the grant of an easement which became appurtenant to the land, and passed with it to the defendant on his purchase. This easement he has accepted and enjoyed, and it is his only title to drain the land into the canal. The principle is generally conceded, and it is certainly equitable, that when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit. *Qui sentit commodum sentire debet et onus*; notes to *Spencer's case*, 1 Smith's L. C. 143; *Savage v. Mason*, 3 Cush. 318; *Coleman v. Coleman*, 7 Harv. 100.

2. If Lloyd had obtained his right to drain into the canal by proceeding under the Revised Code, chap. 40, as he might have done, it is clear by section 13, that the obligation to contribute to repairs would have run with the land. When the same rights are obtained and the same burdens assumed by a contract which expressly stipulates that the burdens shall run with the land, there can be no reason why such a stipulation must be held unlawful and forbidden to have that effect. If Lloyd had proceeded under the

act, he might have made the defendant a party for the purpose of condemning his intervening lands; but defendant would not have been a party to that part of the proceedings which gave Lloyd a share in the canal and adjusted his duties with the other owners, for the defendant had no share in the canal and no concern in those matters.

III. Defendant contends that Cobb and Harrell had no right to permit strangers to the decree of the county court to drain into the canal, whereby a greater quantity of water and sand has been brought down upon his lands than was contemplated in the decree, and that by such misuser of their rights they forfeited them.

1. The first answer which may be given to this proposition is, that the defendant is not in court as the owner of the lands which he owned at the time of the decree, and which are the lands injured by the misuser, but as the assignee of Lloyd, and the whole issue is upon his liability *as such*. The Lloyd lands are not injured by the misuser, and that in other respects he is injured, is not pertinent to the issue. Besides, Lloyd could not complain of the alleged misuser. He derived his right from the new owners, and, by his covenant with them, admits their rightful ownership, and the defendant stands in Lloyd's shoes in respect to the Lloyd lands. If the defendant is damaged in these, by the omission of the parties to the covenant to repair the lower portion of the canal, the covenant points out his remedy. He may determine what repairs are necessary and do them, and compel contribution from the other parties.

2. Supposing, however, that the defendant can avail himself of a defense not open to his assignor, and assuming that the lands which he owned at the date of the decree are damaged by the misuser, is his remedy by defeating the present action?

The principle established by the authorities cited by the learned counsel we conceive to be this: If the owner of an easement over the land of another *unlawfully* enlarges it to the injury of the owner of the servient land, the easement is lost or suspended during the continuance of the misuser. Washburn, 538; *Jones v. Tapping*, 11 C. B. (N. S.) 283; *Wood v. Cooper Miners' Co.*, 14 C. B. 428; *Sharpe v. Hancock*, 7 Man. & Gr. 354.

In the last case the easement was a right to drain over the land of the defendant; the plaintiff altered that part of the drain which was on his own land, so as to throw an increased quantity of water

into that part of it on the defendant's land, and *which the defendant was bound to maintain in repair*, thereby increasing his burden. In the present case, the defendant (independently of his liability as assignee) is under no obligation to repair. The conclusive answer to the defendant's proposition is this: The act of 1795 implicitly allows, and the Revised Code expressly provides, that strangers to the original decree may drain into the canal (§ 9), and it would be absurd to hold that what may be done *in invitum* may not be done by the voluntary agreement of the parties. The possible future enlargement of the use of the easement was contemplated in the grant of it, and was therefore not unlawful. If, however, the defendant is damaged by such a change; if the capacity of the canal at its mouth is insufficient to vent the increased quantity of water flowing down, or if the owners of the canal neglect to repair it, so that the water spreads over the defendant's land, it is clear that he has a remedy.

The acts cited and the common law cast on the owners of the easement the burden of repair. Washburn, 564; *Egremont v. Pulman*, Moody & M. 404; *Bell v. Twentyman*, O. B. 766. But a right of the defendant to damages for a breach of this duty would not relieve him from the present liability.

Judgment affirmed.

INDEX.

ACCESS.

Evidence of.] See EVIDENCE, 776.

ACCIDENT.

Liability for accidental injury to property.] See ACTION, 872, and note, 884.

ACCRETIONS.

Title to, when formed by alluvion — alluvion from artificial causes.] The proprietor of lands bounded by a stream of water is entitled to all accretions thereto, caused by the deposition of alluvion thereon, without regard to the question of whether such accretions were formed solely by natural causes or by such causes influenced by the artificial works of others, and without regard to the question whether such stream is navigable or not. *See Livingston v. County of St. Clair* (Ill.), 516, and note, 524.

ACTION.

1. *Trespass to property — accidental injury.]* Defendant's horses, while being driven by him, with due care on a public highway, were frightened by a locomotive, became unmanageable and ran upon plaintiff's land and broke a post there. *Held*, that the defendant was not liable for the damage. *Brown v. Collins* (N. H.), 872, and note, 884.
2. *Unintentional injury.]* An action will not lie for an unintentional injury resulting from the exercise of one's right of self-defense where neither negligence nor folly is proved against him. *Paaton v. Boyer* (Ill.), 615.
3. *For money paid — when indorser of check liable.]* Plaintiff loaned Hobson money and received therefor the check of Hobson with defendant as indorser, the indorsement containing the words, "waiving demand and notice." Defendant had no interest in the transaction, but knew what the check was given for. Plaintiff did not present the check at the bank for payment until a year had elapsed and Hobson had become insolvent. *Held* that an action for money paid to defendant's use would lie; and that defendant was not entitled to any demand on the maker, or notice of non-payment. *Emery v. Hobson* (Me.), 518.

Trespass by act of stranger.] See TRESPASS, 561.

By master for enticing away servant.] See MASTER AND SERVANT, 780.

By master for injury to servant.] See MASTER AND SERVANT, 643.

ADVERSE USER.

Interruption of — question for jury.] A single instance of attempted interruption of an adverse user, resulting in no actual interruption, and fol-

lowed by no attempt to test the right, does not necessarily destroy the presumption of a grant founded upon a user in other respects sufficient. Such a fact is to be submitted to the jury, with all the circumstances attending it, to have its natural and proper weight according to those circumstances, upon the question whether the user fairly indicates a grant. *Conner v. Sullivan* (Conn.), 10.

AGENCY.

Payment by bank of checks drawn by agent after expiration of agency.] See BANK, 576.

See NEGLIGENCE, 508.

ALLUVION.

See ACCESSION, 516, and note, 534.

ALTERATION OF INSTRUMENTS.

Filling blanks in note.] See NEGOTIABLE INSTRUMENTS, 497.

ANIMALS.

Right to kill when trespassing or damage feasant.] See DEFENSE OF PROPERTY, 389.

ASSAULT AND BATTERY.

1. *When justifiable.]* Defendant and plaintiff's brother were in conflict when defendant struck plaintiff with a knife, supposing him to be the brother. Plaintiff had in fact given no provocation for the blow. The jury found for plaintiff and assessed his damages; but also found a special verdict "that the blow complained of was struck by defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense." *Held*, that the judgment should have been for defendant on the special verdict. *Paxton v. Boyer* (Ill.), 615.
 2. *Unintentional injury.]* A person is not liable for an unintentional injury resulting from the exercise of his right of self-defense, where neither negligence or folly is proved against him. *Id.*
- Exemplary damages in action for.]* See DAMAGES, 270.

ASSIGNMENT.

Warranty on sale by assignee.] See WARRANTY, 690.

BANK.

Payment of checks drawn by agent after expiration of the agency.] Plaintiff, being about to leave home for a short time, gave his clerk a power of attorney to draw checks on a bank for fifteen days, and deposited the power of attorney with the bank. Plaintiff returned, but the clerk continued to draw checks on the bank for several months. Meanwhile the bank-book of plaintiff had been several times written up, but as the clerk was plaintiff's cashier, the fact that he had been drawing checks after the power of attorney expired, had not been discovered by plaintiff. Certain

amounts, so drawn, were used by the clerk for his own purposes. *Held*, that the bank was liable for such amounts. The bank was guilty of negligence in paying checks of the clerk drawn after the expiration of the power of attorney, and could not be excused because plaintiff had failed to examine the returned checks and bank-book. *Manufacturers' National Bank v. Barnes* (Ill.) 576.

BATTERY.

See ASSAULT AND BATTERY.

BEQUEST.

See WILL.

BETTING AND GAMING.

Recovery of stake—demand.] Plaintiff and another deposited money with defendant as stakeholder upon an unlawful wager. Plaintiff, claiming to have won, demanded the entire deposit of defendant; but defendant refused to comply with the demand, and paid the money to the other party. In an action by plaintiff to recover the amount deposited by him, *held* (PARK, J., dissenting), that plaintiff's right was not defeated by the fact that his demand covered the whole amount of the stake, and was made in affirmance of the wager. *Hale v. Sherwood* (Conn.), 87.

BOUNDARY.

Construction of a grant bounded on a stream.] *See note*, 524.

BRIBERY.

Proposal to receive bribe.] A proposal by a public officer to receive a bribe is an indictable offense at common law. *Walsh v. People* (Ill.), 569.

BURDEN OF PROOF.

As to consideration of promissory note.] *See* NEGOTIABLE INSTRUMENTS, 410.

BURGLARY.

Breaking out—variance.] Defendant was charged in an indictment with "breaking and entering" a house. The jury were charged that "if they believed the defendant (however he got into the house) broke out of it, he was guilty." *Held*, error. *State v. McPherson* (N. C.), 769.

CARRIER.

1. *Liability of, for assaults of servants on passengers—exemplary damages.*] Passenger carriers are responsible for assaults and batteries committed by their employees upon passengers. *Hanson v. European and North American Railway Company* (Me.), 404, and *note*, 409.
2. *—.*] Plaintiff entered defendant's car as a passenger, his dog accompanying him. While the train was in motion, a brakeman attempted to eject the dog but was forcibly prevented by the plaintiff. Afterward, the brakeman suddenly attacked plaintiff, inflicting upon him serious injuries

On the trial of an action of trespass therefor against the company, the court charged that if the brakeman "was acting in the performance of his duty as brakeman, he would be justified in using a reasonable degree of force, necessary and proper to accomplish the removal of the dog from the car, but if he used more violence than was necessary, and inflicted on plaintiff blows that were unnecessary to perform his duty, the company would be liable, and the jury may, in that case, award punitive or exemplary damages." *Held*, correct. *Ib*.

3. *Excessive damages.*] The jury returned a verdict for plaintiff of \$4,000. *Held*, that the damages were not so clearly excessive as to justify the court in setting aside the verdict on that ground. *Ib*.
4. *Ejecting passenger — stopping over.*] Plaintiff was a passenger on the cars of defendants, a railroad company, under a contract to carry him from Charlotte, N. C., to Augusta, Ga., with the privilege of stopping at Columbia. His ticket was a through ticket from New York to Savannah, with coupons for the different roads — for defendants' road there being two, one from Charlotte to Columbia, and one from Columbia to Augusta. On the passage from Charlotte to Columbia, W., the conductor on the train, detached both coupons, and gave plaintiff a conductor's check, which, by the rules of the company and the general usage of railroads, was good only for that trip. Plaintiff stopped at Columbia, and the next day took the train for Augusta, in charge of J., another conductor. On this train, his ticket was again demanded, and on his exhibiting the conductor's check, and his ticket, without the coupon, to Augusta, was informed by J. that they did not answer, and that he must either pay the fare to Augusta or leave the train. He failed to pay, and was ejected from the train. *Held*, that the act of J., in ejecting plaintiff from the train, was wrongful, and that defendants were liable in damages therefor. Plaintiff's rights grew out of the terms of his contract, giving him the privilege of stopping at Columbia. He did not owe defendants the duty of giving notice of his intention to stop, or of making inquiries as to the force and effect of the conductor's check; and if he failed to give such notice or make such inquiries, he was guilty of no negligence of which defendants had the right to complain. On the contrary, the duty of taking notice of and regarding his right to stop, was owed by defendants to him, and when conductor W. detached the coupon from Columbia to Augusta, he should have delivered in its place some token having the same force and effect. *Palmer v. Railroad* (S. C.), 750.
5. *Exemplary damages.*] A railroad company may be made to respond in exemplary damages, for the misconduct of its agent in ejecting a passenger. *Ib*.
6. *Limiting time for commencing action against an express company.*] An express company gave a receipt for goods containing a clause exempting it from "any loss or damage whatever, unless claim should be made therefor within ninety days from the delivery to it." *Held*, that an action against the company for non-delivery of the goods was not barred by the lapse of ninety days. *Porter v. Southern Express Co.* (S. C.), 763.

CASES OVERRULED, DOUBTED OR DENIED.

BASSETT v. SALISBURY MANUFACTURING Co., 48 N. H. 569, denied.	<i>Chase</i>
<i>v. Silvesters</i>	496
BROMLEY v. ELLIOT, 38 N. H. 287, questioned.	<i>Eastman v. Clark</i>
	265
COMMONWEALTH v. HOLDER, 9 Gray, 7, denied.	<i>State v. Newman</i>
	5
EMANS v. TURNBULL, 9 Johns. 818, explained.	<i>Mather v. Chapman</i>
	48
HOPKINS v. WALFOLLE, 10 N. H. 180, denied.	<i>Foy v. Parker</i>
	272
LINSLEY v. BUSHNELL, 15 Conn. 225, denied.	<i>Foy v. Parker</i>
	308
PETTY v. TOOKER, 21 N. Y. 267, considered.	<i>Hale v. Everett</i>
	115, 121
POWELL v. BAGG, 8 Gray, 441, questioned.	<i>Connor v. Sullivan</i>
	12
QUIMBY v. MORRILL, 47 Me. 470, overruled in part.	<i>Small v. Olensley</i>
	412
ROBERTSON v. BULLIONS, 11 N. Y. 242, considered.	<i>Hale v. Everett</i> ..
	115, 121
RYLANDS v. FLETCHER, L. R., 3 H. L. 330, questioned.	<i>Brown v. Collins</i> ..
	381
SAWYER v. VAUGHAN, 25 Me. 386, explained.	<i>Small v. Olensley</i>
	412
STATE v. BARTLETT, 11 Vt. 650, denied.	<i>State v. Newman</i>
	5
STATE v. ELLIS, 3 Conn. 185, denied.	<i>State v. Newman</i>
	5
STATE v. HAMILTON, 11 Ohio, denied.	<i>State v. Newman</i>
	5
SWEET v. CUTT, 50 N. H. 489; 9 Am. Rep. 276, denied.	<i>Chase v. Silver-</i>
<i>stone</i>	496
WHIFFLE v. WALFOLLE, 10 N. H. 180, denied.	<i>Foy v. Parker</i>
	272

CHECK.

Negligence of bank in paying.] See BANK, 576.

When indorser liable for money paid.] See ACTION, 512.

CITY.

See MUNICIPAL CORPORATION.

CONSTITUTIONAL LAW.

1. *Exemption from taxation by vote of town.*] A statute authorized towns in which manufacturing establishments should be located to exempt the same from taxation for a term of years. *Held*, that the statute was unconstitutional because (1) it in effect authorized unequal taxation; and (2) the legislature could not delegate to a municipal corporation its power of determining upon what property taxes shall or shall not be imposed. *Brewer Brick Company v. Inhabitants of Brewer (Me.)*, 395.
2. —.] The remission of a tax by a vote of a town is in substance and effect the same as a gift, and a statute authorizing it is void. *Id.*
3. *Regulation of railway freights.*] A State legislature has power to prohibit unjust discrimination in railway freights. *Chicago and Alton R. R. Co. v. People ex rel. Koerner (Ill.)*, 599.
4. —.] An act prohibiting not only unjust discrimination, but all discrimination in railway freights, *held* in violation of the State constitution which provided for the passage of laws to prevent unjust discrimination. *Id.*
5. —.] *It seems* that the discrimination is unjust where less rates for greater distances are charged only on the ground of the existence of competing lines. *Id.*

6. *Draining acts.*] The right of the State to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroad-school-houses, etc. The acts granting such powers are not unconstitutional. *Norfolk v. Cromwell* (N. C.), 787.

Ex post facto law.] See STATUTE, 565.

CONTEMPT.

1. *What constitutes.*] Contempts are of two kinds, direct and constructive; a direct contempt is one offered in the presence of the court while sitting judicially; a constructive contempt is one which tends to obstruct and embarrass a court, though the act be not done in its presence. *People v. Wilson* (Ill.), 538.
2. —.] The publication of an article by any person, even in a newspaper at a place remote from that where the court is being held, concerning a case pending in court, and which has a tendency either to prejudice the public, to corrupt the administration of justice, to influence the court by a threat of "popular clamor," or to reflect on the tribunal, the parties, the jurors, the witnesses or the counsel, *held* a contempt of court and punishable as such by a process of attachment. *Ib.*
3. —.] All acts which impede, embarrass or obstruct a court of justice, or which tend to produce such effects, whether done in or out of court, are to be considered as done in the presence of the court, and are punishable as contempts. *Ib.*
4. *Power of the court to punish therefor.*] The power to punish contempt is original with all courts of justice, and is determined by the principles of the common law and is not limited by existing statutes. *Ib.*
5. *Publications—disclaimer by publisher.*] The meaning and intent of a published article are to be determined by a fair interpretation of the language used, and are matter of law for the court as to whether or not they constitute contempt, and any disclaimer on the part of the publisher as to any intentional disrespect to the court, is not a sufficient ground for discharging a rule to show cause why an attachment should not issue. *Ib.*
6. —.] Where a party is under a rule to show cause why an attachment should not issue against him for contempt, a mere excuse, without appearance, is not sufficient ground for discharging the rule, and will only affect the question of punishment. *Ib.*

CONTRACT.

1. *Limiting location of railroad depot.*] Action to enforce specific performance of a contract to locate a railroad depot upon plaintiff's land and at no other point in the town. *Held*, that the contract was void as against public policy. *Marsh v. Fairbury and North-western R. R. Co.* (Ill.), 564.
 2. *Illegal—between physicians.*] A contract by a physician to take the office of another and practice therein in the name of the other, *held*, void as against public policy. *Jerome v. Bigelow* (Ill.), 597.
- Made on Sunday.*] See SUNDAY.

CONTRIBUTION.

Between co-sureties.] See NEGOTIABLE INSTRUMENTS, 74.

CORPORATION.

1. *When not liable to pay for services of director.*] The law does not imply a promise on the part of a railroad company to pay its directors, for services as such. *Rockford, Rock Island and St. Louis R. R. Co. v. Sage* (Ill.), 587.
2. —.] Directors of a railroad company agreed to allow themselves \$1,000 each, for services and expenses, but no formal resolution to that effect was adopted by the board of directors. *Held*, that the company was not liable to a director for his services and expenses. *Ib.*
3. —.] A corporation is not liable for services performed or expenses incurred prior to its organization. *Ib.*
4. *Repeal of charter.*] The Port Royal Railroad Company was chartered in 1857, and its charter was renewed in 1870. The charter of 1857 prescribed the mode by which lands might be condemned to the use of the company; and by a general act, passed in 1868, a different mode of condemning lands to the use of all railroad corporations was prescribed. *Held*, that the company must proceed in the mode prescribed by the act of 1868. *McOres v. Port Royal R. R. Co.* (S. C.), 729.

See FOREIGN CORPORATIONS, 682.

COVENANT.

Against whom enforced.] Where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced against an assignee of the covenantor with notice. *Norfleet v. Cromwell* (N. C.), 787.

CRIMINAL CONVERSATION.

Evidence in action for.] In an action for criminal conversation with the wife of plaintiff, evidence to show the pecuniary circumstances of the parties at the time of the commission of the offense is admissible. *Peters v. Lake* (Ill.), 598, and note, 596.

CRIMINAL LAW.

1. *Uncertainty in sentence.*] Where a person was sentenced to imprisonment in the State prison for a term of one year, to commence upon the expiration of another term; and one year afterward the first judgment and sentence were adjudged void; *held*, on habeas corpus, that the sentence either commenced to run immediately on rendition, and had expired, or it was void for uncertainty, and in either case, the prisoner was entitled to his discharge from the State prison. *Ex parte Roberts* (Nev.), 1.
2. *Larceny — of property stolen in and brought from another State.*] If a person commits larceny in one country or State and carries the goods stolen into another country or State, and there makes any removal or asportation of them, having in his mind the intent to steal, he may be properly indicted for larceny of them in the latter locality. *State v. Newman* (Nev.), o.

3. *Indictable offense — proposal to receive bribe.*] A proposal by a public officer to receive a bribe is an indictable offense at common law. *Walsh v. People* (Ill.), 569.
4. *Burglary — breaking out — variance.*] A defendant cannot be convicted of that with which he is not charged. *Therefore*, where the judge below, upon the trial of an indictment charging the defendant with breaking and entering into the house of the prosecutor and stealing therefrom, charged the jury "that, if they believed the defendants (however they may have got into the house) broke out of it, they were guilty:" *Held* to be error, and to entitle the defendants to a new trial. *State v. McPherson* (N. C.), 769.
5. *Trial — evidence on trial of joint defendants.*] In criminal trials against two or more defendants, the judge has the right in his discretion to separate the evidence bearing upon the case of each, and to instruct the jury, as to what is competent against one, and incompetent against another. *State v. Collins* (N. C.), 771.
6. *Challenge of jurors.*] It is no good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case according to the law and evidence, uninfluenced by any opinion he may have so formed from such rumor. *Ib.*
7. *Separate trials of joint indictment.*] When several persons are jointly indicted, they cannot claim separate trials as a matter of right. Such separation is a matter of discretion with the court. *Ib.*
8. *Limiting time for argument.*] In trials for capital felonies, the presiding judge has the right to regulate, by reasonable rules and limitations, the arguments in the cause: *Hence*, it is no good ground for a new trial that the counsel of the prisoner was limited by the court, in his remarks, to one hour and a half. *Ib.* and *note*, 775.

DAMAGES.

1. *Exemplary or punitive, in actions for tort.*] In a civil action for a tort which may also be punished criminally, punitive or exemplary damages are not recoverable. *Fay v. Parker* (N. H.), 270.
2. —.] In trespass for an assault and battery, the court instructed the jury that if they found for the plaintiff they might, in addition to the compensatory damages, give exemplary or punitive damages. *Held*, error. *Ib.*
3. —.] *Quere* whether exemplary or punitive damages are allowable in any civil action, *Ib.*
4. *Contracts payable in foreign coin. Execution.*] The defendant agreed in England, to pay the plaintiffs a commission of five per cent on the charter of a vessel hired for thirty-three thousand three hundred dollars in hard Spanish dollars, i. e., \$1,665. *Held*, that the brokerage should be paid in coin of the United States, equivalent to that sum in hard Spanish dollars, with interest from the day it was payable; and that execution should issue specifically for the coin. *Stringer v. Coombs* (Ma.), 414.

5. *Exemplary against corporation.*] A corporation may be made to respond in exemplary damages for the misconduct of its agent—as, for instance, a railroad corporation, for the misconduct of a conductor in ejecting a passenger from the train. *Palmer v. Railroad* (S. C.), 750.

Accidental injury to property.] See ACTION, 873 and note, 884.

In action against carrier for assault of servant.] See CARRIER, 404.

On raising grade of street.] See MUNICIPAL CORPORATION, 501

In action of replevin.] See REPLEVIN, 462.

DEFENSE OF PROPERTY.

1. *Right to kill animals damage feasant.*] A statute provided that no person should, in any way, destroy any mink between certain dates, under a penalty prescribed. The constitution declared that "all men have certain natural, essential and inherent rights," among which was included the right of "protecting property." In an action to recover such penalty, it was proved that defendant shot the minks upon his own land while they were chasing his geese. *Held*, a good justification without showing that the geese were in imminent danger and could not otherwise have been protected. *Aldrich v. Wright* (N. H.), 389.

2. —.] The law relating to the defense of person and property considered. *Ib.*

3. —.] Cases relating to the killing of animals trespassing or damage feasant collected. *Ib.*

DEPOSIT.

In savings bank — when it completes gift.] See GIFT, 69.

DEVISE.

See WILL.

DIRECTOR.

When corporation not liable to pay for services of.] See CORPORATION, 587.

DOWER.

When widow's claim not barred.] A husband conveyed real estate to his wife, and both united in a conveyance to F. A creditor of the husband procured the conveyances to be set aside as fraudulent, and obtained possession himself. *Held*, that on the death of the husband the widow was entitled to dower. *Richardson v. Wyman* (Me.), 459, and note, 463.

DRAINAGE ACTS.

See CONSTITUTIONAL LAW, 787.

EASEMENT

If the party, from whom an assignee purchases, cannot complain of an alleged misuser of an easement, the assignee cannot, as he stands in the shoes of him from whom he purchased. *Norfleet v. Cromwell* (N. C.), 787.

EVIDENCE.

Husband and wife—evidence of access.] At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by a statute allowing parties to testify in their own behalf. *Boykin v. Boykin* (N. C.), 776.

Burden of proof as to consideration of promissory note.] See NEGOTIABLE INSTRUMENT, 410.

In action for crim. con.] See CRIMINAL CONVERSATION, 598.

On trial of defendants jointly indicted.] See CRIMINAL LAW, 771.

EXECUTION.

On a judgment upon a contract payable in coin.] See DAMAGES, 424.

EXEMPLARY DAMAGES.

When allowable in actions of tort.] See DAMAGES, 370.

In action against carrier.] See CARRIER, 404.

EXPLOSION.

Condition against loss by.] See INSURANCE, 537.

EXPRESS COMPANY.

See CARRIER, 763.

FOREIGN CORPORATION.

Right to buy and sell lands.] A corporation created in Connecticut for the sole purpose of buying and selling lands cannot buy and sell, or hold in perpetuity, lands in Illinois. It is against the public policy of Illinois. *Correll v. City of East St. Louis* (Ill.), 683.

FORGERY.

See NEGOTIABLE INSTRUMENTS, 427.

GAMING.

See BETTING AND GAMING.

GIFT.

When complete—deposit in savings bank—declaration of intention.] A wealthy and childless widow deposited in a savings bank \$250 in her own name, as trustee for W., the child of a neighbor and friend. Soon after she told his parents that she had deposited such sum for their son, and afterward spoke of it as belonging to him. She afterward drew out the money at different times and applied it to her own use, and died, leaving a will in which no mention was made of the deposit or of W. *Held*, that the deposit was a complete gift; that the depositor could not revoke it, and that her executor was liable to W. for the amount. *Minor v. Rogers* (Conn.), 69.

HALE.

De Jure Maria.] *See note*, 51.

HIGHWAY.

Defect in—negligence.] Plaintiff's horse, while being driven on a highway with due care, became frightened without plaintiff's fault and ran off the highway, across private property, on to defendant's turnpike, where he was injured by falling over a defective bridge, which defendant was bound to repair. *Held*, that defendant was liable. *Baldwin v. The Greenwood Turnpike Company* (Conn.), 38.

Accidental injury to one on public street.] *See note*, 384.

Liability of municipal corporation for injuries to property on raising grade of street.] *See MUNICIPAL CORPORATION*, 591.

Nuisance in.] *See MUNICIPAL CORPORATION*, 731.

Railroads in.] *See MUNICIPAL CORPORATION*, 634.

HUSBAND AND WIFE.

1. *Necessaries—liability of husband for pew rent.*] In an action to recover the rent of a church pew hired by defendant's wife, *held*, that a pew is not included in the list of articles known as necessaries, and that the husband was not liable therefor. *St. John's Parish v. Bronson* (Conn.), 17.

2. *Responsibility of husband for wife's torts.*] Under the Illinois statutes giving to the wife the control of her separate property, and of her own earnings, the husband is not liable for torts of the wife committed during coverture when he was not present, and in which he in no manner participated. *Martin v. Robson* (Ill.), 578.

Dower—when claim for, not barred by fraudulent conveyance.] *See DOWER*, 459.

Evidence of access.] *See EVIDENCE*, 776.

ILLEGAL CONTRACTS.

See CONTRACTS.

INDORSER.

See ACTION, 512.

INJUNCTION.

May be issued on Sunday.] A court of equity may lawfully issue an injunction on Sunday where necessary to prevent irreparable injury to property. *Langabier v. Fairbury, etc., R. R. Co.* (Ill.), 550, and *note*, 554.

INSANE DELUSION.

See WILL, 478.

INSURANCE.

FIRE.

1. *Fire policy—construction of—fire caused by explosion.*] A policy of insurance provided that the company should not be held liable "for any loss

or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power, nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." *Held*, that the company was not exempted, by such clause, from liability for losses by fire caused by explosion, but simply from liability for losses occasioned by the explosion itself. *Commercial Insurance Company v. Robinson* (Ill.), 557.

3. *Re-insurance — apportionment of loss.*] Plaintiff insured goods for \$6,000 and effected a re-insurance with defendant for \$2,000, the policy of re-insurance providing that the loss should be payable "*pro rata* at the same time, and in the same manner, as the re-insured company." A loss happened, for which plaintiff paid \$600 in full discharge of liability. *Held*, that plaintiff could only recover \$200 of defendant. *Illinois Mutual Ins. Co. v. Andes Ins. Co.* (Ill.), 620.

JURORS.

Challenge of, on criminal trial.] See CRIMINAL LAW, 771.

JURY.

Sitting aside verdict for improper influences.] See NEW TRIAL, 449.

LANDLORD AND TENANT.

1. *Lease — outer walls of demised premises.*] The owner of a building leased a "store" therein. *Held*, that the lessee had the right to the use and occupation of the outer walls belonging to that portion of the tenement including the store, for the purpose of posting bills and notices thereon. *Riddle v. Littlefield* (N. H.), 888.
2. *Destruction of demised premises by casualties of war — when tenant released.*] Covenant on a lease for seven years from 1st July, 1869. The rent which had accrued up to the 1st April, 1862, had been paid, and the action was against the lessee, to recover so much of the rent as had accrued from that day until the end of the term. The defense was, that the defendant had been deprived of the beneficial use and enjoyment of the premises, according to the intent of the lease, from and after the 1st April, 1862, by the casualties of war, but it was no part of the defense that the defendant had surrendered, or offered to surrender the lease, or otherwise to rescind the contract, and it was in evidence that he used and occupied the premises, after the close of the war, in 1865, until the end of the term. *Held*, that the defense set up was insufficient to relieve the defendant from the plaintiff's claim. *Coogan v. Parker* (S. C.), 659.
3. —.] The authorities reviewed, and the true doctrine applicable to the defense held to be, that, where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder, shall be discharged from the payment of rent. *Ib.*
4. —.] If the tenant be deprived of the beneficial enjoyment of the leased premises, according to the intent of the lease, that is a destruction of

the subject-matter of the lease, within the meaning of those terms as herein used, whether there be a physical destruction of the premises or not. *Id.*

3. —.] To complete the defense, the tenant must show that he rescinded the contract by a surrender, or offer to surrender, of all benefit therein which remained to him. *Id.*

LARCENY.

Of property stolen in another State.] See CRIMINAL LAW.

LEASE.

Of mines.] See MINE, 697.

LEGACY.

See WILL.

LITTORAL RIGHTS.

Rights to accretion.] See SEA-SHORE.

LORD'S DAY.

See SUNDAY.

MARRIED WOMAN.

See DOWER, 459; HUSBAND AND WIFE.

MASTER AND SERVANT.

- 1 *Injury to servant by negligence of co-servant.]* A declaration alleged that plaintiff was employed as a laborer, in repairing a culvert for defendants, which was in a dangerous condition; that the danger was unknown to him, but known to defendants' agent and roadmaster in charge of the repairs; and that defendants, by their agent and roadmaster, so negligently conducted the repairs that plaintiff was injured. *Held*, that the declaration was insufficient, because there was no allegation of negligence on the part of the defendants in selecting competent servants, nor that the injury was caused by the dangerous condition of the culvert. Defendants' roadmaster and plaintiff must be deemed fellow-servants. *Lander v. Androscoggin Railroad Co.* (Me.), 492, and *note*, 495.
- 2 *Action by master for injury to servant.]* Plaintiff hired laborers to make a crop on his farm, under a contract, by which the laborers were to have one-third of the crop for their services, the plaintiff retaining two-thirds for himself. In June, one of the laborers was shot, and so severely wounded that he was disabled from working in the crop for several weeks, and, in consequence thereof, as it was contended, the crop made was much less in quantity than it otherwise would have been. *Held*, that plaintiff had sustained no legal injury which gave him a right of action against the party who inflicted the wound. *Burgess v. Carpenter* (S. C.), 648.
- 3 —.] The common law gives the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except where the servant is a menial one—*semble*. *Id.*

4. *Master liable for torts of servant.*] A master is responsible in a civil action for the tortious act of his servant, committed in the course of the latter's employment, and it makes no difference that the act was done willfully and without the knowledge of the master, or even in disobedience of his orders. *Redding v. South Carolina R. R. Co.* (S. C.), 681.
5. *Course of employment.*] Whether a servant was acting in the course of his employment when he committed a tortious act, is a question of fact. *Ib*
6. *Action by master against third person for enticing away servant.*] Plaintiff employed laborers to work on his farm, under written contracts whereby they were to receive part of the crops for their services. *Held*, (1) that he could maintain an action against defendant for inducing them to break their contracts; (2) that it was no defense that the contracts were unreasonable. *Haskins v. Royter* (N. C.), 780.

MINE.

1. *Lease of—conveyance by leases.*] A, being seized in fee of a tract of land, in consideration of \$2,000, granted to B "the right and privilege of entering in or upon, by himself or his agents, all or any part" of said tract, "for the purpose of searching for minerals and fossil substances, conducting mining operations to any extent" he "may deem advisable, and for working, removing, selling and appropriating" to his own use, "for the term of ten years from," etc., "all * * * phosphates that may be found on, by any person or persons, or contained in, any part" of said tract; provided that B "shall not, at any one time during" said term, "engage in working over one-third part" of said tract; such one-third part to be selected by him as often as he may desire. The deed also contained grants to B of the right to cut and remove trees and wood—such trees and wood to remain the property of A—and of a general right of way, with the privilege of constructing railroads, and other roads and machinery, to be used in the transportation, manufacture, etc., of said substances, with the right to remove the same at the expiration of the term: *Held*, that this was a demise of the phosphate beds for the term of ten years, with the exclusive right of raising, selling, disposing of, and manufacturing all phosphates found during the term, and that B had the right to divide his interest and convey part of it to others. *Massot v. Moses* (S. C.), 697.
2. —.] The expression "that may be found by any person or persons, or contained in any part" of the land, distinguishes this case from *Lord Mountjoy's*, Co. Litt. 165, and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted. *Ib*:
3. —.] The principal cases on the subject reviewed, and the principles deducible from them stated. *Ib*.
4. —.] Unopened veins or beds of minerals contained in and below the surface of the soil may be demised, as if they were separate pieces of land. *Ib*.

3. —.] A grant, for a term of years, of the exclusive right to search for, take, sell and dispose of, to the grantee's use, all phosphates found during the term in a designated tract of land, is a demise of the beds or veins of phosphates contained in the land. *Id.*

MONEY PAID.

See ACTION, 518.

MUNICIPAL CORPORATION.

1. *Liability of, for negligence of appointees.*] A city, in pursuance of its charter, appointed an inspector of steam boilers within the city, and by by-law imposed a penalty upon any person who should use such a boiler without having it tested by the inspector. *Held*, that the city was not liable for the negligence of the inspector in the discharge of his duty — he being an agent of the State and not of the city. *Mead v. New Haven* (Conn.), 14.
2. *City ordinance, validity of — flagmen at railroad crossing.*] A city ordinance required a railroad company to keep a flagman by day and a red lantern by night, at a point where its track crossed a street. *Held*, that the requirement was not reasonable, the crossing being an ordinary one, and not unusually dangerous. Whether such a requirement is within the constitutional limitations in the exercise of the police power is a question for the courts to decide. *Toledo, Wabash and Western R. R. Co. v. City of Jacksonville* (Ill.), 611.
3. *Taxation by — medium of payment — effect of debt.*] Under an ordinance to raise supplies, taxes were assessed upon plaintiff's property by a municipal corporation, and the treasurer of the corporation being about to enforce payment under the provisions of a general ordinance, requiring all taxes to be "paid in specie or in the notes of specie-paying banks," plaintiff offered as payment a debt, of equal amount with the taxes, due him by the corporation. *Held*, that the plaintiff had no right, legal or equitable, to compel the corporation to receive the debt as payment or satisfaction of the taxes, or as a counter-claim, or as a set-off or discount. *Trenholm v. Charleston* (S. C.), 782.
4. —.] Taxes of a municipal corporation are assessed under its political powers, and where its ordinance directs the medium of payment, such ordinance must be complied with. *Id.*
5. *Power to build market-house.*] A municipal corporation was authorized by its charter to "appoint market-places and regulate the same." *Held*, that it had power to build and repair a market-house. *Smith v. City of Newbern* (N. C.), 766.
6. *Railroad in street — rights of adjoining owner.*] Although the fee of a street is in the adjoining owner, a municipal corporation may grant the right to a railroad company to lay its track in the street; but the company is liable to the adjoining owner for injuries to his premises sustained thereby. *Indianapolis, Bloomington and Western R. R. Co. v. Hartley* (Ill.), 624.
7. *Liability for failure to keep streets in repair — nuisance.*] Where a municipal corporation is charged by law with the duty of keeping in repair the

streets and sidewalks within the corporate limits, want of ordinary care is the true measure of its liability, when it is charged with having caused the death of a foot passenger by its negligence in not keeping in repair a cellar door forming part of the surface of a sidewalk. *Johnston v. Charleston* (S. C.), 731.

8. *Liability for injuries to property by raising grade of streets — damage.*] By the elevation of the grade of a street in a city, surface water flowed into the basement of plaintiff's building, and thereby the building was injured and the walls cracked. *Held*, that the city was liable for the damage, but that plaintiff could not recover damages for inconvenience to his tenants or injury to their personal property. *City of Dixon v. Baker* (Ill.), 591, and note, 598.
9. *Construction of sewers.*] A city is bound to use reasonable care in the construction of its sewers. *Id.*
10. *Liability for injury to private property for obstructing access thereto.*] A city granted to a railroad company the right to lay its track along a street. The company, in laying its track, made excavations obstructing the use of plaintiff's adjoining premises and endangering their stability. *Held*, that the city was liable. *City of Pekin v. Brereton* (Ill.), 629.
11. *Power to issue bonds — unauthorized bonds void.*] A municipal corporation, without express authority for so doing, issued bonds, simply for the purpose of making a donation. The appellants became the innocent purchasers of the bonds without any notice of the want of authority on the part of the corporation to issue them. *Held*, that the acts of the corporation were *ultra vires*, and hence the bonds so issued were absolutely void even in the hands of an innocent holder. *Bissell v. The City of Kankakee* (Ill.), 554.

NECESSARIES.

Do not include religious instruction.] See HUSBAND AND WIFE, 17.

NEGLIGENCE.

1. *Liability for injury to person caused by defect in wharf — agent of owner when responsible — joint action against owner and agent not maintainable.*] Plaintiff, the driver of a job wagon, was injured by stepping into a hole in a wharf, while attempting to carry a seaman's chest on board a vessel. The part of the wharf where the accident occurred was leased to A & B by the agents of the owners of the wharf, for the purpose of loading and dispatching vessels, the agents being bound to repair. Persons going to the vessel were compelled by obstructions in other parts of the wharf to take the route which plaintiff took, which was through a shed. *Held*, that the owners and agents were liable for the injury; but that the liability was not joint. A verdict against both was allowed to stand against the agents on the discontinuance of the action as against the owners of the wharf. *Campbell v. Portland Sugar Co.* (Me.), 508.
- A —.] Wharf owners and their agents, so long as they keep the wharf open and occupied, or rented for the business of loading and dispatching vessels, are bound to all whom the proffered facilities bring there, to use due care to keep the wharf and its approaches in good condition. *Id.*

3. *Injury to person not a passenger by defects in railroad platform.*] A person not a passenger, but lawfully on a railroad platform, may recover for injuries received by accidentally stepping through a hole, negligently left in the platform by the company's agent. *Toledo, Wabash and Western R. R. C v. Grush* (Ill.), 618.
 4. —.] Plaintiff lawfully entered upon a railroad platform to look for certain freight belonging to his employer. He accidentally stepped through a hole in the platform, which had existed for two years, and of which the company's agent was aware. *Held*, that there was evidence from which a jury might find a verdict for plaintiff. *Id.*
- Defect in way.*] See HIGHWAY.
- Liability of a municipal corporation for negligence of its appointees.*] See MUNICIPAL CORPORATION, 14.
- Of bank on payment of checks.*] See BANK, 576.
- Proximate cause of, question for jury.*] See NUISANCE, 456.
- See ACTION, 372, and note, 384.

NEGOTIABLE INSTRUMENTS.

1. *What constitutes a promissory note — due bill.*] A writing in these words, "Due C. D. seventeen dollars, value received, A. B.," *held* (FOSTER and PHELPS, JJ., dissenting), not to be a "promissory note not negotiable," within the statute limiting the time of suing on such instruments. *Overier v. Lookwood* (Conn.), 40, and note, 43.
2. *Promissory note — joint and several.*] A promissory note written "I promise," etc., and signed by several persons as makers, is joint as well as several. *Monson v. Drakeley* (Conn.), 74.
3. —, *surety — party adding name after inception — contribution.*] A promissory note, due on demand, was executed by the maker and two sureties and delivered to the payee. Afterward the payee, becoming dissatisfied with the responsibility of the names attached, required the maker to furnish additional security. Thereupon the defendant, at the maker's request, signed the note under the signatures of the sureties and took from the maker collateral security for his risk. The plaintiff, one of the sureties, was compelled to pay the note and brought action against the defendant for contribution. *Held*, that the presumption was that defendant signed the note as surety and not as guarantor, and was therefore liable to contribute. *Id.*
4. *Burden of proof as to consideration of promissory note.*] In an action on a promissory note between the original parties thereto, where a want of consideration is relied upon as a defense, and evidence is given on the one side in the affirmative and on the other in the negative, of the fact of consideration, the burden of proof is on the plaintiff to satisfy the jury upon the whole evidence of that fact. *Small v. Clewley* (Me.), 410.
5. *Witness in action on promissory note — maker competent to impeach.*] In an action upon a promissory note by a *bona fide* holder, the maker is a competent witness to prove that he was induced to sign it by fraudulent repre-

sentations that it was another and different instrument. *Abbott v. Rea* (Me.), 427.

6. *Where signature to note was fraudulently obtained.*] In an action by a *bona fide* holder against the maker of a promissory note, defendant alleged that his signature had been obtained thereto by means of fraudulent representations of the payee, that the paper which he signed was an instrument of a different character. *Held*, that if the jury should find that defendant had been guilty of negligence in signing the paper, he would be liable thereon. *Ib.*

7. *Alteration of note — filling blanks.*] In an action by a *bona fide* holder of a promissory note against the maker, defendant alleged that the note was a forgery, and his evidence tended to show that the instrument, when delivered, contained blanks unfilled, which had been afterward fraudulently filled. *Held*, that it was for the jury to determine whether the instrument was delivered as an incomplete paper with blanks to be filled, and that, if it was so delivered for any purpose, the person receiving it had implied authority to fill the blanks, and the maker would be liable thereon to a holder in good faith. *Ib.*

Unauthorized bonds, void.] See MUNICIPAL CORPORATION, 554.

NEW TRIAL.

Verdict set aside for improper influences used.] A verdict will be set aside if it be shown that the jury have been approached during the pendency of the cause, and information volunteered upon the matters in issue therein, by a friend or relative of him in whose favor the verdict was rendered, although such improper influence was not exerted at the request, or with the knowledge of the party prevailing before the jury. *Bradbury v. Cony* (Me.), 449, and *note*, 454.

NOTE.

See NEGOTIABLE INSTRUMENTS.

NUISANCE.

1. *Noxious vapors and noisome smells.*] To cause a whole neighborhood to become sickly, by erecting a dam across a stream, thus causing the water to stagnate and corrupt the air, is a public nuisance, for which an indictment lies. *State v. Rankin* (S. C.), 737.

2. —.] So also, it is a public nuisance, and indictable, if the pond, without causing sickness, produces smells and stenches, which render the enjoyment of life and property in the community uncomfortable. *Ib.*

3. —.] If a mill pond, which has existed for seventy years, becomes a public nuisance by corrupting the air, causing disagreeable smells and sickness the owner may be indicted. *Ib.*

4. *Where nuisance is produced by acts of another.*] One is not guilty of a public nuisance unless the injurious consequences complained of are the natural, direct and proximate cause of his own acts. If such consequences are caused by the acts of others, so operating on his acts as to produce the injurious consequences, then he is not liable. *Ib.*

5. *Proximate cause—question for jury.*] Defendants negligently piled boards in the traveled path of a highway. A stranger, passing along with a wagon loaded with barrels, ran over these boards, producing a rattling noise which frightened the plaintiff's horse, causing him to jump sideways, thereby throwing the plaintiff from his wagon and severely injuring him. The horse was well broken and carefully driven. *Held*, that on these facts, a nonsuit was error; it was for the jury to determine whether or not the defendant's acts were the proximate cause of plaintiff's injury. *Lake v. Milliken* (Me.), 456.

In street.] *See* MUNICIPAL CORPORATION, 731.

OFF-SET.

Of corporate debt against municipal taxes.] *See* MUNICIPAL CORPORATION, 722.

ORDINANCE.

See MUNICIPAL CORPORATION, 611.

PARTITION.

Right to—provision in deed against.] The owner of land conveyed an undivided share of it by warranty deed which contained, after the description and before the *habendum*, this clause, "to remain in common and undivided." *Held*, that the clause was neither a condition nor a covenant, and that the vendor was not estopped to sue his grantee for partition. *Spaulding v. Woodward* (N. H.), 893.

PARTNERSHIP.

1. *Test of—sharing profits.*] Participation in profits is not a decisive test of partnership, but such participation is competent evidence to show the relation of principal and agent between the persons taking the profits and those carrying on the business. *Eastman v. Clark* (N. H.), 193.
2. —.] The question of liability of one sharing profits is a question of agency, whether he stands in the relation of principal to the one who contracted the obligation. *Id.*
3. —.] In assumpsit against three, one only defended, and the question tried was whether he was a partner of the others. The jury was instructed to find that he was so, if he did business with them under an agreement either to share the profits or the gross receipts. *Held*, that the instruction was wrong. *Id.*

PASSENGER CARRIER.

See CARRIER.

PHYSICIANS.

Agreement to practice in name of another.] *See* CONTRACT, 537.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PROPERTY.

Defense of.] *See* DEFENSE OF PROPERTY.

"PROTESTANT."

Definition of term.] See RELIGIOUS SOCIETY, 82.

RAILROAD.

Agreement limiting location of depots.] An agreement by a railroad company to locate a depot at one particular place in a town and at no other place in said town, is against public policy and void. *Maret v. Fairbury, etc., R. R. Co.* (Ill.), 564.

Defect in depot platform—injury to one not a passenger.] See NEGLIGENCE, 618.

In street—right of adjoining owners.] See MUNICIPAL CORPORATION, 634.

In street—obstructing access to private property.] See MUNICIPAL CORPORATION, 639.

Liability for wrongful ejectment of passenger.] See CARRIER, 750.

Liability in exemplary damages.] See DAMAGES, 750.

Ordinance requiring flagman at crossing.] See MUNICIPAL CORPORATION, 611.

Regulating railway freights.] See CONSTITUTIONAL LAW, 599.

When company not liable to pay for services of director.] See CORPORATION, 587.

RELIGIOUS SOCIETY.

1. *Injunction to restrain change of denominational preaching.]* Certain persons organized themselves under a general statute into a corporation as a "Unitarian Society of Christians," and continued to hold property and conduct public worship as such until the pastor publicly avowed that he was "neither a Unitarian nor a Christian." Thereupon a majority of the members of said society formed a new society and re-employed said pastor. He continued to preach his own doctrines in the meeting-house of the society, and was supported by a majority of the society. The minority filed a bill against the majority and the pastor, praying an injunction to restrain the preaching of such doctrines in the meeting-house. *Held*, that they were entitled to the injunction. *Hale v. Everett*, (N. H.), 82.
2. *Protestant.]* The term "Protestant," as used in the constitution of New Hampshire, means all Christians who deny the authority of the pope of Rome; it does not include Mahometans, Jews, pagans or infidels. *Id.*

REPEAL.

Pending proceedings.] See STATUTE, 565.

Of charter.] See CORPORATION, 729.

REPLEVIN.

1. *Damages—measure of.]* The Revised Statutes of Maine, ch. 96, § 11, provide that "if it appears that the defendant" in replevin "is entitled to a return of the goods, he shall have judgment and a writ of return, accordingly, with damages for the taking and costs." *Held*, that the measure of damages to the defendant was the value of the property at the time of the taking, with interest and any special damage resulting from

the taking and detention; and that the defendant was entitled to have the damages assessed, up to the time of the trial at *nisi prius* by the jury. *Washington Ice Co. v. Webster* (Me.), 463.

2. —.] A defendant in replevin who makes good his title, is entitled to damages for the interruption of his possession, the loss of the use of the goods, and for their deterioration; but damages arising from the loss of customers are too indefinite, remote and contingent to be allowable. *Id.*
3. —.] The measure of damages is the same in replevin as in trover. *Id.*

SABBATH.

See SUNDAY.

SALE.

By assignee — warranty.] *See* WARRANTY, 690.

SAVINGS BANK.

Deposit in.] *See* GIFT, 69.

SEA SHORE.

Right to sea-weed.] Sea-weed cast upon the shore between high and low-water mark belongs to the public, and may be lawfully appropriated by any person. *Mather v. Chapman* (Conn.), 46, and *note*, 51.

SENTENCE.

Uncertainty in.] *See* CRIMINAL LAW, 1.

SERVANT.

See MASTER AND SERVANT.

SPIRITUALISM.

See WILL, 473.

STATUTE.

1. *Repeal — pending proceedings.*] A statute imposed a penalty of \$50 for certain offenses. A subsequent statute amended the former so as to authorize a penalty of not exceeding \$100, and contained a proviso that the second act should not apply to proceedings pending under the first, except so far as to change the amount of the penalty. *Held*, (1) that the first act was repealed by the second; (2) that the proviso in the latter was unconstitutional as an *ex post facto* law; and therefore (3) that prosecutions pending under the first act were defeated by the passage of the second. *Wilson v. Ohio and Mississippi R. R. Co.* (Ill.), 565.
2. *Official copy not conclusive evidence of the terms of statute.*] On March 1, 1870, the general assembly of the State passed an "Act to revise, simplify and abridge the rules, practice, pleadings and forms of courts in this State." The 19th section of the enrolled act, to which the great seal of the State was affixed, and which was signed, in the senate chamber, by the president of the senate and the speaker of the house of representatives,

and received the approval of the governor, provided that the courts for the county of Barnwell should be held at *Barnwell*; but it appeared by the journals of the two houses of the general assembly, that the same section of the bill, as it finally passed both houses, provided that the courts for that county should be held at *Blackville*. By the law, as it stood at the passage of the act, the place last named was the county seat of Barnwell county. *Held*, that the 19th section of the act was void, and, consequently, that *Blackville* remained the county seat of Barnwell county. *State v. Platt* (S. C.), 647.

3. —.] The enrolled act, duly authenticated as the constitution prescribes, and approved and signed by the governor, is not conclusive evidence of the terms of the bill, as it passed the houses of the general assembly, but the journals of the houses, or other appropriate evidence, may be received, to show what those terms were; and, whenever it appears that the enrolled act differs from the bill as it passed, in a substantial matter, the judiciary department of the State may declare the whole act, or the part affected by the change, unconstitutional and void. *Ib.*
4. *Several parts of a statute.*] Every substantial part of a proposed enactment is a "bill," within the constitutional sense of the term, and must pass through all the constitutional stages of enactment before it becomes law. *Ib.*

STATUTE OF FRAUDS.

1. *Memorandum in writing — delivery and acceptance.*] Plaintiffs made defendant a verbal offer for a quantity of ice; defendant afterward telegraphed that he would accept the offer, and plaintiffs wrote to him inclosing a memorandum of the contract of sale for his signature, but defendant did not receive the letter, owing to a misdirection, until several days had elapsed, and meanwhile he had sold the ice to other parties. Plaintiffs seized the ice on a writ of replevin. *Held*, that there was no memorandum signed by the party to be charged within the statute of frauds; and that the seizure, by the officer, of the ice and delivery to plaintiffs under the replevin process did not amount to a delivery and acceptance within that statute. *Washington Ice Co. v. Webster* (Me.), 463.
2. *Oral misrepresentations of financial credit of another.*] Plaintiff was induced to loan money to O. by means of false and fraudulent oral representations made by defendant, concerning the financial credit and ability of O. The money was paid by plaintiff to defendant, who passed it over to O. *Held*, that the statute of frauds was a defense to an action for money had and received. *Hunter v. Randall* (Me.), 490.
3. —.] *It seems* that defendant might have been liable in some form of action if the credit had been given to him instead of to O.; or if defendant and O. had conspired to defraud plaintiff; or if defendant's representations had related to specific property of O., instead of to his general character and credit. *Ib.*

STREET.

See HIGHWAY.

SUBTERRANEAN WATER.

See WATERS, 414.

